(25)

No. 95-865-CFX
Status: GRANTED

Title: United States, Petitioner
v.
Winstar Corporation, et al.

Docketed:
December 4, 1995

Court: United States Court of Appeals for the Federal Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Stouck,Jerry, Cooper,Charles J.

40 copies ea ptn & sep appdx.

Entry	Date	Note	Proceedings and Orders
1	Nov 17 1995	G	Application (A95-440) to extend the time to file a petition for a writ of certiorari from November 28, 1995 to December 28, 1995, submitted to The Chief Justice.
2	Nov 22 1995		(A95-440) Supplemental Memorandum of the United States filed.
3	Nov 24 1995		Application (A95-440) granted by the Chief Justice extending the time to file until December 6, 1995.
4	Dec 1 1995	G	Petition for writ of certiorari filed. (Response due January 3, 1996)
5	Dec 1 1995		Appendix of petitioner United States filed.
6	Dec 21 1995		Brief of respondents Winstar Corporation, et al. in opposition filed.
7	Dec 22 1995		Brief of respondent Glendale Federal Bank, FSB in opposition filed.
8	Jan 3 1996		DISTRIBUTED. January 19, 1996 (Page 3)
11	Jan 10 1996	X	Reply brief of petitioner United States filed.
9	Jan 19 1996		Petition GRANTED. The brief of the Solicitor General is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 1, 1996. The briefs of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 29, 1996. A reply brief, if any, is to be filed pursuant to Rule 25.3. Rule 29.2 does not apply. **********
10	Feb 16 1996		SET FOR ARGUMENT WEDNESDAY, APRIL 24, 1996. (1ST CASE).
12	Mar 1 1996		Joint appendix filed.
13	Mar 1 1996		Brief of petitioner United States filed.
16	Mar 15 1996		CIRCULATED.
14	Mar 22 1996	G	Motion of respondents for divided argument filed.
15	Mar 26 1996		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Federal Circuit(1 copy/J.A. CONFIDENTIAL)(BOX)
18	Mar 27 1996		Brief amici curiae of Coast Federal Bank, FSB, et al. filed.
19	Mar 27 1996	X	Brief amici curiae of AmBase Corporation and Carteret Bancorp, Inc. filed.
17	Mar 28 1996	X	Brief amici curiae of Watts Health Foundation, Inc., et al. filed.
21	Mar 29 1996	X	Brief of respondent Glendale Federal Bank, FSB filed.
22	Mar 29 1996		LODGING consisting of ten copies of a letter dated June

2 PP

No. 95-865-CFX

Entry	Date	Note	Proceedings and Orders
			12, 1989 from Asst. Atty. General Carol Crawford to Representative Chalmers Wylie submitted by counsel for respondent Glendale Savings Bank
23	Mar 29 1996	X	Brief of respondents Winstar Corporation and the Statesman Group, Inc., et al. filed.
24	Mar 29 1996	X	Brief amici curiae of Western Federal Savings and Loan Association, et al. filed.
25	Mar 29 1996	X	Brief amici curiae of Keystone Holdings, Inc., et al. filed.
26	Mar 29 1996	X	Brief amicus curiae of Long Island Savings Bank, FSB filed.
27	Mar 29 1996	X	Brief amici curiae of American Assn. of State Colleges and Universities, et al. filed.
28	Mar 29 1996	X	Brief amici curiae of Trinity Ventures, Ltd., et al. filed.
29	Mar 29 1996	X	Brief amicus curiae of Dollar Bank, F.S.B. filed.
30	Mar 29 1996	X	Brief amicus curiae of Chamber of Commerce of the United States filed.
31	Mar 29 1996	X	Brief amici curiae of Aerospace Industries Association of America, Inc., et al. filed.
32	Mar 29 1996	X	Brief amici curiae of Franklin Financial Group, Inc., et al. filed.
20	Apr 1 1996		Motion of respondents for divided argument GRANTED.
33	Apr 5 1996		Record filed.
		*	Original record proceedings U.S. Court of Federal Claims (7 EXPANDING FOLDERS - CONTAINS CONFIDENTIAL MATERIALS)
34	Apr 9 1996	G	Application (A95-833) for leave to file a reply brief in excess of the page limitation, submitted to The Chief Justice.
35	Apr 11 1996		Application (A95-833) granted by the Chief Justice, allowing a maximum of 30 pages.
36	Apr 17 1996	X	Reply brief of petitioner United States filed.
38	Apr 24 1996		ARGUED.
39	Apr 24 1996	P	Motion of respondent Glendale Federal Bank, FSB for leave to file a supplemental brief after argument filed.

Supreme Court, U.S.
FILED

95 • 865 DEC 1 1995

No. OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

WINSTAR CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
PAUL BENDER
Deputy Solicitor General
JAMES A. FELDMAN
Assistant to the Solicitor General
DOUGLAS LETTER
JACOB M. LEWIS
SCOTT R. MCINTOSH
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the doctrine that a contract will be interpreted to cede government regulatory authority only if it does so in unmistakable terms is applicable in a breach of contract action where the plaintiff seeks money damages but not injunctive relief.

2. Whether, absent a specific congressional authorization to do so, a federal agency may bind itself and its successors by contract to exercise governmental regulatory authority in a particular way, regardless of subsequent legislative changes.

3. Whether provisions of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, limiting the ability of thrift institutions to use intangible assets to satisfy minimum capitalization requirements were "public and general acts," for purposes of the sovereign acts doctrine.

PARTIES TO THE PROCEEDING

Aside from the parties named in the caption, United Federal Savings Bank, Statesman Savings Holding Corp., The Statesman Group, Inc., American Life and Casualty Company, and Glendale Federal Bank, F.S.B., were parties in the court of appeals.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutory provisions involved	2
Statement	2
Reasons for granting the petition	13
Conclusion	26

TABLE OF AUTHORITIES

Cases:

Amino Brothers Co. v. *United States*, 372 F.2d 485 (Ct. Cl.), cert. denied, 389 U.S. 846 (1967)	20, 22
Atlas Corp. v. *United States*, 895 F.2d 745 (Fed. Cir.), cert. denied, 498 U.S. 811 (1990)	22
Bowen v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986)	8, 14, 15, 16, 17, 23
Carteret Savings Bank v. *OTS*, 963 F.2d 567 (3d Cir. 1992)	6, 17, 21
Charter Federal Savings Bank v. *OTS*, 976 F.2d 203 (4th Cir. 1992), cert. denied, 113 S. Ct. 1643 (1993)	16, 17, 18, 22
City of El Paso v. *Simmons*, 379 U.S. 497 (1965)	20
Deming v. *United States*, 1 Ct. Cl. 190 (1865), appeal dismissed, 76 U.S. 145 (1870)	22
Education Assistance Corp. v. *Cavazos*, 902 F.2d 617 (8th Cir.), cert. denied, 498 U.S. 896 (1990)	25
Fahey v. *Mallonee*, 332 U.S. 245 (1947)	2
Federal Crop Insurance Corp. v. *Merrill*, 332 U.S. 380 (1947)	22
Flagship Federal Savings Bank v. *Wall*, 748 F. Supp. 742 (S.D. Cal. 1990)	18

Cases—Continued: Page

Guaranty Financial Services, Inc. v. *Ryan*, 928 F.2d 994 (11th Cir. 1991) 17
Home Building & Loan Ass'n v. *Blaisdell*, 290 U.S. 398 (1934) 20
Horowitz v. *United States*, 267 U.S. 458 (1925) 12, 13, 22
Hughes Communications Galaxy, Inc. v. *United States*, 998 F.2d 953 (Fed. Cir. 1993) 24
Lynch v. *United States*, 292 U.S. 571 (1934) 23
Merrion v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982) 14, 15
National Railroad Passenger Corp. v. *Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451 (1985) 18-19
North American Commercial Co. v. *United States*, 171 U.S. 110 (1898) 20
Northern Pacific Ry. v. *Minnesota*, 208 U.S. 583 (1908) 20
OPM v. *Richmond*, 496 U.S. 414 (1990) 21-22
Perry v. *United States*, 294 U.S. 330 (1935) 23
RTC v. *FSLIC*, 34 F.3d 982 (10th Cir. 1994) 17
Security Savings & Loan v. *Director, OTS*, 960 F.2d 1318 (5th Cir. 1992) 5
Stone v. *Mississippi*, 101 U.S. 814 (1880) 20
Tony Downs Foods Co. v. *United States*, 530 F.2d 367 (Ct. Cl. 1976) 22
Transcapital Financial Corp. v. *Director, OTS*, 44 F.3d 1023 (D.C. Cir. 1995) 17
Transohio Savings Bank v. *Director, OTS*, 967 F.2d 598 (D.C. Cir. 1992) 5, 17, 21
United States v. *Cherokee Nation*, 480 U.S. 700 (1987) 14, 15, 16
United States Trust Co. v. *New Jersey*, 431 U.S. 1 (1977) 20

Cases—Continued: Page

Veix v. *Sixth Ward Building & Loan Ass'n*, 310 U.S. 32 (1940) 20
Welch v. *Cook*, 97 U.S. 541 (1878) 19
Western Fuels-Utah, Inc. v. *Lujan*, 895 F.2d 780 (D.C. Cir.), cert. denied, 498 U.S. 811 (1990) 25
Wisconsin & Michigan Ry. v. *Powers*, 191 U.S. 379 (1903) 19-20

Constitution, statutes and regulations:

U.S. Const. Art. I, § 10, Cl. 1 (Contract Clause) 20
Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 4
Emergency Home Finance Act of 1970, Pub. L. No. 91-351, 84 Stat. 450 4
Federal Home Loan Bank Act, ch. 522, § 30, 47 Stat. 741 21
Financial Institutions Reform, Recovery, and Enforcement Act of 1989 Pub. L. No. 101-73, 103 Stat. 183 ..... *passim*
12 U.S.C. 1464(c)(2)(A) 6
12 U.S.C. 1464(t)(1)(A) 4, 5
12 U.S.C. 1464(t)(2) 4, 5
12 U.S.C. 1464(t)(3) 5, 6
12 U.S.C. 1464(t)(9) 5
Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 4
12 U.S.C. 1437 note 3
12 U.S.C. 1441a 3
12 U.S.C. 1464 (1988) 18
12 U.S.C. 1729(f)(4)(A) (1988) 21
12 U.S.C. 1821 3
12 C.F.R.:
Section 567.2 5
Section 567.5 5

Miscellaneous:	Page
135 Cong. Rec. (1989):	
p. 11,795	5
p. 18,863	4
45 Fed. Reg. 72,681 (1980)	4
47 Fed. Reg. (1982):	
p. 3543	4
p. 31,859	4
p. 52,961	4
H.R. Rep. No. 54, 101st Cong., 1st Sess. Pt. 1 (1989)	2, 3, 4
S. Rep. No. 19, 101st Cong., 1st Sess. (1989)	3

In the Supreme Court of the United States

OCTOBER TERM, 1995

No.

UNITED STATES OF AMERICA, PETITIONER

v.

WINSTAR CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The en banc opinion of the court of appeals (App. 1a-52a) is reported at 64 F.3d 1531. The panel opinion of the court of appeals (App. 53a-105a) is reported at 994 F.2d 797. The opinions of the Court of Federal Claims (App. 106a-152a, 153a-180a, 181a-182a, 183a-195a) are reported at 21 Cl. Ct. 112, 25 Cl. Ct. 147, 25 Cl. Ct. 541, and 26 Cl. Ct. 904.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1995. On November 22, 1995, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including December 6, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, are set forth in the Appendix to this petition. App. 196a-204a.

STATEMENT

This petition concerns three separate cases that were consolidated for appeal before the Federal Circuit. The circumstances of the three cases vary somewhat, but they involve a common factual background and similar legal issues.

1. Savings and loan institutions or "thrifts" have been the subject of pervasive federal support, supervision, and regulation since the 1930s. See *Fahey* v. *Mallonee*, 332 U.S. 245, 250 (1947) ("[b]anking is one of the longest regulated and most closely supervised of public callings"). The modern thrift industry is now "a federally-conceived and assisted system to provide citizens with affordable housing funds." H.R. Rep. No. 54, 101st Cong., 1st Sess. Pt. 1, at 292 (1989) (*House Report*).

In the late 1970s and early 1980s, high interest rates and inflation resulted in a substantial increase in the cost of attracting deposits for thrifts. At the same time, many thrifts held long-term, low-yielding fixed rate mortgages. This "negative interest rate

mismatch" precipitated a major crisis in the thrift industry. See *House Report* at 294-295. Many thrifts were left with severely depleted capital or negative net worth. Their frequent response was "that the easiest way to regain profitability and generate adequate levels of new capital, was to grow rapidly," thus increasing the size of their loan portfolio and putting more of their depositors' money at risk. *House Report* at 298-299; S. Rep. No. 19, 101st Cong., 1st Sess. 9 (1989). The result was a record number of failures of thrift institutions and a loss of public confidence that threatened to engulf the entire industry.

2. FIRREA was enacted in 1989 to prevent the collapse of the thrift industry and to restore it to economic health. This statutory scheme has provided well over $100 billion in taxpayer money to close insolvent institutions and recapitalize the federal insurance fund protecting thrift deposits.

FIRREA modified the overall federal thrift regulatory scheme by: (1) abolishing the Federal Savings and Loan Insurance Corporation (FSLIC) and transferring its functions to other agencies; (2) creating a new thrift deposit insurance fund under the Federal Deposit Insurance Corporation (FDIC); (3) eliminating the Federal Home Loan Bank Board (the Bank Board) and replacing it with the Office of Thrift Supervision (OTS)—an office within the Department of the Treasury—and making the OTS Director responsible for regulation of all federally insured savings associations and chartering of federal thrifts; and (4) establishing the Resolution Trust Corporation (RTC), charged with resolving certain closed thrifts. See 12 U.S.C. 1437 note, 1441a, and 1821.

At the "heart" of this legislative reform (135 Cong. Rec. 18,863 (1989) (Sen. Riegle)) was the requirement that OTS "prescribe and maintain uniformly applicable capital standards for savings associations," subject to strict statutory constraints. 12 U.S.C. 1464(t)(1)(A). The federal regulatory scheme had long imposed certain capital requirements on federally insured institutions, including both requirements of minimal capitalization and restrictions on what could be counted as capital in determining whether those requirements were satisfied.[1] FIRREA prescribed three strict new minimum capital requirements that thrifts must satisfy. See 12 U.S.C. 1464(t)(2) (requirements for "core capital," "tangible capital," and "risk-based capital"), *reprinted at* App. 196a-198a. The new strengthened capital requirements were considered crucial to prevent a recurrence of the thrift crisis since, in Congress's view, "[t]o a considerable extent, the size of the thrift crisis resulted from the utilization of capital gimmicks that masked the inadequate capitalization of thrifts." *House Report* at 310.

From 1981 until the enactment of FIRREA, the Bank Board had permitted thrifts to use "goodwill"

[1] Those requirements have been the subject of numerous statutory and regulatory changes over the years. See, *e.g.*, Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469; Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132; Emergency Home Finance Act of 1970, Pub. L. No. 91-351, 84 Stat. 450. In 1982 alone the regulations governing thrift capital reserve requirements changed three times. See 47 Fed. Reg. 3543 (1982); *id.* at 31,859; *id.* at 52,961. See also 45 Fed. Reg. 72,681 (1980) (Bank Board proposal to change regulatory treatment of goodwill).

to satisfy federal regulatory capital requirements. Goodwill is an intangible "asset" that, under Generally Accepted Accounting Principles (GAAP), equals the amount by which the cost of an acquisition (including all liabilities assumed by the acquirer) exceeds the fair market value of the acquired tangible assets. In the context of a supervisory merger, when such goodwill existed, it was known as "supervisory goodwill." Thus, the surviving thrift could declare as an asset the merged thrift's net worth deficit.

Another type of intangible asset involved in this case is Regulatory Accounting Practices goodwill, or "capital credits." The Bank Board often allowed double counting of funds that FSLIC contributed to merging thrifts, permitting such funds to be counted both as cash and again as goodwill for purposes of meeting regulatory requirements. See *Security Savings & Loan* v. *Director, OTS*, 960 F.2d 1318, 1320 n.5 (5th Cir. 1992); *Transohio Savings Bank* v. *Director, OTS*, 967 F.2d 598, 604 (D.C. Cir. 1992).

To strengthen the financial soundness of federally insured thrifts, FIRREA severely restricted the ability of thrifts to use intangible assets like supervisory goodwill or capital credits to meet the statute's three new minimum capital requirements. 12 U.S.C. 1464(t)(1)(A), 1464(t)(2) and (3); 1464(t)(9); 12 C.F.R. 567.2, 567.5. As Congress recognized, "[g]oodwill is not cash. It is a concept, and a shadowy one at that. When the Federal Government liquidates a failed thrift, goodwill is simply no good. It is valueless. That means, quite simply, that the taxpayer picks up the tab for the shortfall." 135 Cong. Rec. 11,795 (1989).

Although it places limits on the use of intangible assets to meet federal capital requirements, FIRREA

does not eliminate such use altogether. FIRREA initially allowed some supervisory goodwill to be used for meeting some federal capital requirements, and it also permits goodwill to be counted for the purpose of determining the extent to which thrifts may make certain types of loans and investments. See, *e.g.*, 12 U.S.C. 1464(c)(2)(A), 1464(t)(3). Although limited discretion was given to OTS, the statute itself set forth most of the restrictions on the use of intangible assets like goodwill. See *Carteret Savings Bank* v. *OTS*, 963 F.2d 567, 574-582 (3d Cir. 1992).

3. Respondents are the owners of two now-defunct thrift institutions (United Federal Savings Bank, which was owned by plaintiff Winstar Corporation, and Statesman Bank for Savings, which was owned by plaintiff Statesman Savings Holding Corp.), and one currently operating thrift, Glendale Federal Bank, FSB, which were involved in mergers or acquisitions of thrifts prior to 1989. Following enactment of FIRREA, respondents filed three separate actions against the United States in the Court of Federal Claims, seeking monetary relief for asserted breach of contract or frustration of purpose caused by FIRREA, or just compensation for a claimed taking of constitutionally protected property rights. The contract and property right that respondents claim is the right to treat supervisory goodwill as capital for purposes of satisfying federal capital requirements for periods of 25 to 40 years and, in the case of Statesman, to treat capital credits as capital indefinitely.

Respondents based their contract claims primarily on agreements that they signed with the FSLIC, and on regulatory resolutions and letters issued by the Bank Board governing transactions in which

goodwill was created. The material facts in each of the three cases differ to some extent, but they raise the same pivotal legal issues.

Each of the three cases involves either a merger or an acquisition under which one thrift voluntarily merged with or took over one or more failing thrifts in 1981 (Glendale), 1983 (Winstar), and 1987 (Statesman). App. 8a, 9a, 11a. In each instance, the thrifts needed the regulatory approval of the Bank Board for the merger or acquisition. In each instance, the thrift and the FSLIC also entered into an agreement setting the terms of the transaction, as well as the terms of actual or potential government assistance.[2] In all three instances, those contracts provided that "[n]othing in this Agreement shall require any unlawful action or inaction" by the parties. App. 82a.

In each of the three transactions, goodwill was created. In each case, the Bank Board issued "forbearance letters" under which the agency stated that it would forbear in certain circumstances from bringing enforcement proceedings against the thrifts for failing to satisfy regulatory capital requirements following the merger or acquisition. The Bank Board also issued resolutions permitting each thrift to use GAAP principles, under which substantial amounts of goodwill would be amortized over lengthy periods: *Glendale* involved $716 million to be amortized by the thrift over 40 years, App. 9a, *Winstar* involved $9.1 million to be amortized by the thrift over 35 years, App. 28a, 171a, and *Statesman* involved $25.8 million in goodwill to be amortized over 25 years, App. 10a. In

---

[2] In *Winstar*, the government contributed over $5.5 million to the transaction, App. 194a. In *Statesman*, the government contributed $60 million, App. 10a.

addition, the supervisory assistance agreement between FSLIC and Statesman expressly permitted Statesman to count $26 million of the federal cash contribution as a "capital credit" that "[f]or purposes of reports to the Bank Board * * * shall be credited to [Statesman's] regulatory capital account and shall constitute regulatory capital." C.A. App. 803.

Under FIRREA's stringent new regulations limiting the use of intangible assets to meet the new regulatory capital requirements, none of the intangible assets created in any of the three transactions could continue to be counted as capital. The Winstar and Statesman thrifts, like many other thrifts at the time, were unable to meet the new capitalization requirements, and were placed in receivership; they no longer exist. Glendale raised the necessary new capital in private markets and is today an operating thrift. App. 14a.

4. In each of these three cases, the Court of Federal Claims held that the subject thrift had a contract with the government guaranteeing favorable long-term regulatory treatment of goodwill, and that Congress through FIRREA breached that contract by restricting the use of existing goodwill to meet the new capitalization mandates.

In *Winstar*, the trial court held that the thrift had an implied-in-fact contract with the government concerning treatment of goodwill. App. 187a. The court rejected the government's argument that the thrift's claims were defeated by the "unmistakability doctrine" derived from this Court's decision in *Bowen* v. *Public Agencies Opposed to Social Security Entrapment* (*POSSE*), 477 U.S. 41, 52-53 (1986), and other cases. That doctrine provides that a contract will not be construed to waive sovereign

regulatory authority unless the intent to do so is expressed by the contract in unmistakable terms. App. 157a-170a. The court concluded that FIRREA had breached the implied contract by restricting use of goodwill for regulatory capitalization purposes. App. 171a-172a.

The trial court also rejected the government's argument that there could be no liability for breach of contract in any event because of the "sovereign acts" doctrine, which precludes breach of contract actions against the government where the government's inability to perform is the result of a "public and general act" of the Congress. The court found this doctrine inapplicable because, in the court's view, FIRREA was not a "public and general act" insofar as it abrogated the contracts of a particular class of entities that had contracted to use supervisory goodwill to satisfy federal capital requirements. App. 173a-179a. The court announced that, in subsequent proceedings, it would determine the amount of the injuries, if any, and the appropriate measure of damages. App. 180a.

The trial court relied on its *Winstar* rulings regarding the unmistakability and sovereign acts doctrines in its subsequent rulings in *Statesman* and *Glendale*. The court held that the thrifts in those cases had express contracts with the government concerning regulatory treatment of goodwill. App. 120a-125a. The court rejected the government's argument that the contracts themselves contained clauses making clear that they were subject to changes in the regulatory scheme. App. 125a-132a. The court concluded that the contracts covering Statesman and Glendale had been breached by FIRREA. It consolidated the two cases, combined

them with *Winstar*, and certified its order for immediate interlocutory appeal. App. 150a-152a.

5. The Federal Circuit accepted the consolidated cases for interlocutory appeal, and a divided panel of the court reversed the decision of the Court of Federal Claims. The panel held that the plaintiffs had failed to meet the high standard for showing that their contracts contained terms guaranteeing them a specified form of favorable regulatory treatment for lengthy periods stretching well into the next century. App. 53a-105a. The Federal Circuit then granted respondents' petitions for rehearing en banc. After rebriefing and reargument before the full court, the court reversed the panel decision and affirmed the trial court's ruling on contract breach liability. App. 1a-46a.

The Federal Circuit held that the express contracts into which FSLIC had entered with all three thrifts included promises that all three could count supervisory goodwill (and Statesman could count capital credits as well) as capital for purposes of satisfying federal capital requirements. App. 17a-29a. As noted above, pp. 7-8, *supra*, Statesman's supervisory assistance agreement (SAA) expressly permitted it to use $26 million of capital credits to satisfy federal capital requirements. App. 24a. None of the SAAs, however, contained express provisions permitting supervisory goodwill to be similarly used. The court held that each thrift's "contract was not limited to the SAA itself, but also included the contemporaneous resolutions and letters issued by the FSLIC and the Bank Board." App. 17a (Glendale); see App. 25a (Statesman), 27a (Winstar). In each case, the court found in those documents the crucial term promising that supervisory goodwill could be counted

for the next 40 years (Glendale), 25 years (Statesman), or 35 years (Winstar) to satisfy regulatory capital requirements. App. 18a-22a (Glendale); 25a-26a (Statesman); 28a (Winstar).[3] The court also found that the FSLIC and Bank Board had the authority to enter into contracts containing those terms. App. 39a.

The Federal Circuit held that the unmistakability doctrine—pursuant to which contractual promises by the government to exercise its regulatory authority in a certain way will be found only if expressed in unmistakable terms—has no application in this case. App. 31a-38a. The Federal Circuit agreed with the trial court that the unmistakability doctrine applies only where plaintiffs are seeking to hold the government to an alleged bargain by seeking injunctive relief, and not where, as here, plaintiffs are only seeking contract damages. App. 31a-38a. The Federal

---

[3] For example, in *Glendale*, the court relied on a Bank Board resolution requiring Glendale to furnish an accountant's opinion that "(a) indicates the justification under [GAAP] for the use of the purchase method of accounting for its merger with Broward, (b) specifically describes * * * any goodwill or discount of assets arising from the merger to be recorded on Glendale's books, and (c) substantiates the reasonableness of amounts attributed to goodwill and the discount of assets and the resulting amortization periods and methods." App. 18a-19a. The resolution also required Glendale to "submit a stipulation that any goodwill arising from this transaction shall be determined and amortized in accordance with" a Bank Board memorandum providing that "[a]n application * * * requesting approval for a business combination to be accounted for by the purchase method of accounting, from which intangible assets will result, should include a description of any resulting intangible assets and the plan for their amortization." App. 19a & n.4.

Circuit also ruled that the sovereign acts doctrine is inapplicable in these cases. In the court's view, FIRREA cannot be said to be a "public and general act" because it "singles out supervisory goodwill for special treatment, albeit treatment less harsh than other forms of intangible assets." App. 42a.

Judge Nies dissented, essentially for the reasons given in her prior opinion for the panel. App. 47a-48a. In her view, "no clause can be found in the contracts under which the Bank Board and the FSLIC promised to pay if Congress decided to step in and do away with the 'purchase method of accounting,' a euphemism for spinning straw into gold, and other accounting gimmicks." App. 48a. Therefore, "[i]n this highly regulated industry, the thrifts did not negotiate contracts that freed them from the risk of a change in regulations." App. 48a. She also stated that the majority's approach "impermissibly fuses 'the two characters which the government possesses as a contractor and as a sovereign.'" App. 47a (quoting *Horowitz* v. *United States*, 267 U.S. 458, 461 (1925)). In her view, the thrifts' sole possible remedy at this point was to seek compensation for a taking, and she believed that the matter should be remanded to the trial court for a determination of whether a taking had occurred. App. 47a.

Judge Lourie also dissented. He believed that "the sovereign acts doctrine is a barrier to the thrifts' recovery under a breach of contract theory." App. 49a. In his view, FIRREA was a public and general act because "Congress did not act only against certain thrifts or contracts; it acted to deal with the entire thrift system in order to save it." App. 50a-51a. Judge Lourie relied on this Court's holding in *Horowitz* that "the United States when sued as a

contractor cannot be held liable for an obstruction to the performance of [a] particular contract resulting from its public and general acts as a sovereign." App. 49a (quoting *Horowitz*, 267 U.S. at 461).

REASONS FOR GRANTING THE PETITION

The en banc decision by the Federal Circuit regarding the application of the unmistakability doctrine is in conflict with rulings of other circuits as well as with this Court's application of the doctrine. The court's decision also incorrectly resolves important questions concerning the authority of executive branch officials to commit the government to refrain from future exercises of sovereign regulatory authority, and it misconceives the scope of the sovereign acts doctrine. The decision may, in addition, have an enormous fiscal impact upon the federal government. It directly affects over 90 cases that are pending in the Court of Federal Claims and have been stayed awaiting a ruling in this case. The issues raised are also present in cases pending in the Ninth Circuit and in several district courts. The pending cases involve a total of approximately $10 billion in goodwill. The decision below also establishes precedent in the Federal Circuit, which could affect a wide range of government contract cases outside the thrift context. Review by this Court is therefore warranted.

1. a. The alleged contractual terms on which respondents rest their claims of breach in this case would have committed the government to exercise its regulatory authority in a particular way over a period of between 25 and 40 years (or forever, in the case of Statesman's capital credits). Under respondents' theory, those terms would have to be construed to

have bargained away the discretion of the then-existing federal regulatory authorities under the then-existing statutory scheme to interpret and enforce then-existing capital requirements. They would also have to be construed to have bargained away Congress's right to change the law—as it did in FIRREA—to overhaul federal regulation of thrift institutions by strengthening capital requirements. The alleged contractual terms thus fall squarely within the unmistakability principle articulated by this Court in *Bowen* v. *Public Agencies Opposed to Social Security Entrapment* (*POSSE*), 477 U.S. 41, 52-53 (1986); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982), and *United States* v. *Cherokee Nation*, 480 U.S. 700, 707 (1987).

In *POSSE*, the Court held that States that entered into contracts with the federal government that gave them the right to withdraw their employees from the social security system had not obtained the right to enforce those provisions when subsequent legislation made withdrawal of state employees illegal. The Court relied on the principle that "courts should be extremely reluctant to construe [agreements] in a manner that forecloses Congress' exercise of [its sovereign] authority." 477 U.S. at 52. The Court concluded that "contractual arrangements, including those to which a sovereign itself is party, 'remain subject to subsequent legislation' by the sovereign." *Ibid.*

In *POSSE*, the Court referred to its decision in *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982), for the governing legal principles. See 477 U.S. at 52. *Merrion* involved an Indian Tribe's claim to the right to impose a severance tax on oil and gas production on Reservation land. The Tribe had

previously negotiated leases with the oil and gas producers that included royalty payments to the Tribe. The Court held that, absent an unmistakable surrender of its sovereign right to impose a tax, the Tribe's action in negotiating the royalty payments should not be construed as a surrender of that right. The Court stated that "sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." 455 U.S. at 148.

In *United States* v. *Cherokee Nation*, 480 U.S. 700, 707 (1987), the Court invoked the unmistakability doctrine to find that a federal agreement to cede fee simple title to a riverbed to an Indian Tribe should not be construed to have surrendered the federal navigational servitude. Citing *POSSE*, the Court stated that a waiver of "sovereign authority will not be implied but instead must be surrendered in unmistakable terms." *Ibid.* (quoting *POSSE*, 477 U.S. at 52).

b. The Federal Circuit expressly declined to apply the unmistakability doctrine in this case. In doing so, the court of appeals did not question the proposition that the claimed contractual terms involved the exercise by the government of its sovereign regulatory authority. Instead, the court relied on the fact that "[t]he thrifts did not ask for * * * injunctive relief that would have enjoined the thrift regulators from applying the FIRREA requirements to the thrifts" and "[m]oney damages, in contrast to injunctive relief, presents little threat to the government's sovereign powers." App. 37a.

This ruling by the Federal Circuit conflicts with this Court's consistent treatment of the unmis-

takability doctrine as a principle governing contract *interpretation*, not contract *relief*. The Court has never suggested that a plaintiff may recover on a claim that the government failed to honor an implied contractual term regarding the exercise of its sovereign regulatory authority, so long as the plaintiff seeks only monetary relief. Indeed, in *Cherokee Nation*, the plaintiffs did not seek injunctive relief, but instead sought "compensation [under the Takings Clause] for damage to the[] riverbed interests" that they alleged had been damaged. 480 S. at 701. Notwithstanding that monetary claim, the Court applied the doctrine that "a waiver of sovereign authority will not be implied, but instead must be 'surrendered in unmistakable terms.'" 480 U.S. at 707 (quoting *POSSE*, 477 U.S. at 52).

The Federal Circuit's ruling also conflicts with the decision of the Fourth Circuit in *Charter Federal Savings Bank* v. *OTS*, 976 F.2d 203 (4th Cir. 1992), cert. denied, 113 S. Ct. 1643 (1993). *Charter Federal* involved claims regarding treatment of goodwill that are virtually identical to the claims in the cases at bar. The plaintiff thrift in *Charter Federal* sought "a declaratory judgment concerning its contractual rights" that the parties understood could "later serve[] as a basis for money damages." 976 F.2d at 209-210. The court rejected plaintiff's claims by applying the unmistakability doctrine. The court held that, "[w]here the federal government is a party to a contract, courts should apply a[] * * * special rule of contract construction." 976 F.2d at 211. Citing this Court's decision in *POSSE*, the court observed that the "FHLBB approved [the thrift's] use of supervisory goodwill under its then statutory discretion to permit such accounting practices, but

made no explicit promise to [the thrift] of continued approval throughout the life of the amortization period." 976 F.2d at 212. "Without a more explicit promise, we will not enlarge the scope of guarantees given to Charter." *Ibid.*[4]

Had the court of appeals applied the unmistakability doctrine, it could not have reached the result it did. The strongest argument in these cases for finding an unmistakable contractual commitment not to employ the sovereign power of the federal government was presented by the provision in Statesman's contract with the FSLIC that expressly provided that Statesman could treat its capital credit as an asset to

---

[4] The courts of appeals have similarly applied the unmistakability doctrine as a principle of contract interpretation in actions for injunctive relief arising in a factual setting similar to that in these cases. In *Guaranty Financial Services, Inc.* v. *Ryan*, 928 F.2d 994, 1000-1001 (11th Cir. 1991), the Eleventh Circuit held that courts in such cases must apply the rule of construction "that one who wishes to obtain a contractual right against the sovereign that is immune from the effect of future changes in law must make sure that the contract confers such a right in unmistakable terms." See also *Carteret*, 963 F.2d at 574 (noting relevance of unmistakability doctrine to thrift claims of contract rights the same as those raised here). Although the D.C. Circuit has suggested that it is possible that there is a distinction between actions for injunctive and for monetary relief, see *Transcapital Financial Corp.* v. *Director, OTS*, 44 F.3d 1023, 1025-1026 (D.C. Cir. 1995), that court has also denied contractual claims for injunctive relief in a situation virtually identical to those involved in these cases. See *Transohio Savings Bank* v. *Director, OTS*, 967 F.2d 598 (D.C. Cir. 1992). By contrast, although not mentioned by the Federal Circuit, the Tenth Circuit has also found the unmistakability doctrine inapplicable outside the injunctive context. *RTC* v. *FSLIC*, 34 F.3d 982 (10th Cir. 1994).

satisfy federal capital requirements. See pp. 7-8, *supra*. That contract, however, was subject to three provisions that clearly provide that any term in the contract could be vitiated by subsequent legislation. These provisions required Statesman to comply with all statutes, regulations, and orders of the United States regarding the conduct of Statesman's business, provided that nothing in the agreement would require any unlawful action by either party, and stated that, if any provision in the agreement were to be invalid or unenforceable, the remaining provisions would still have full force and effect. App. 126a; C.A. App. 853, 854, 855.

The claims of all three thrifts regarding supervisory goodwill rest on far weaker footing. Indeed, the express commitment that Statesman obtained regarding treatment of its capital credit highlights the failure of any of the three thrifts to obtain a like commitment regarding the use of supervisory goodwill to satisfy capital requirements. Nowhere in any of the three cases did the contracts—even if construed to include Bank Board resolutions and letters[5]—mention the use of supervisory goodwill to

[5] Bank Board resolutions were not contract documents; they were regulatory agency decisions issued in informal agency adjudications approving applications by thrifts to consummate mergers that could not have been completed without first obtaining regulatory approval (see, *e.g.*, 12 U.S.C. 1464 (1988)). See *Charter*, 976 F.2d at 211 ("resolutions issued by the [Bank Board] in connection with the mergers merely granted that agency's approval of the merger and the accounting practices employed by [the thrift] in connection therewith," and did not constitute a contract); *Flagship Federal Savings Bank* v. *Wall*, 748 F. Supp. 742, 748 (S.D. Cal. 1990) ("the forbearance letter was not a contract but a statement by the [Bank Board] that it would not prosecute"). Cf. *National Railroad Passenger Corp.* v. *Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 465-469 (1985) (no contractual rights had been created when repealed statutory provision had merely stated a regulatory policy).

meet federal capital requirements, much less grant the thrifts permission to use supervisory goodwill for that purpose for many years, regardless of changes in the governing statutes and a thorough overhaul of the regulatory system.

2. Even if the Federal Circuit's failure to apply the unmistakability doctrine were correct, the Federal Circuit's conclusion that the then-existing thrift regulators had the authority to enter into contracts binding the government not to apply new statutory capital requirements conflicts with fundamental principles governing the exercise of legislative power and its delegation. The Federal Circuit construed the contracts to include a promise that the federal government would continue to permit supervisory goodwill and capital credits to be counted as capital for purposes of federal thrift capitalization requirements. The court construed that promise to extend for periods of up to 40 years into the future, regardless of any change in the law. It is doubtful whether any such commitment by regulators concerning the exercise of federal regulatory authority could bind the legislative branch of the federal government. Certainly such a delegation should not be found to exist absent the most explicit grant of authority by Congress to enter into such arrangements.

More than a century ago, this Court held that there can be no contract right to a regulatory scheme, regardless of a party's expectations to the contrary. See *Welch* v. *Cook*, 97 U.S. 541, 542 (1878); *Wisconsin & Michigan Ry.* v. *Powers*, 191 U.S. 379, 386-387

(1903). "[G]overnmental [regulatory] powers cannot be contracted away." *North American Commercial Co.* v. *United States*, 171 U.S. 110, 137 (1898); *Northern Pacific Ry.* v. *Minnesota*, 208 U.S. 583, 598 (1908); *City of El Paso* v. *Simmons*, 379 U.S. 497, 508-509 (1965); *Amino Brothers Co.* v. *United States*, 372 F.2d 485, 491 (Ct. Cl.), cert. denied, 389 U.S. 846 (1967).[6] Because "the legislature cannot bargain away the police power of a State," *Stone* v. *Mississippi*, 101 U.S. 814, 817 (1880), this Court has consistently ruled that the Contract Clause in the Constitution does not require governments "to adhere to a contract that surrenders an essential attribute of its sovereignty." *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 23 (1977). To hold otherwise would impermissibly permit legislators or unelected federal regulatory officials to use contracts with private individuals to commit subsequent legislatures not to take actions that are in the public interest. See *United States Trust*, 431 U.S. at 45 (Brennan, J., dissenting). See also *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 434-444 (1934).

The Federal Circuit in this case nevertheless held that "the Bank Board and the FSLIC, as the principal regulators of the thrift industry, were fully empowered to enter into the contracts at issue here." App. 39a. In support of that holding, the court cited only the general provision in FSLIC's statutory charter granting it authority "[t]o make contracts,"

---

[6] In *Veix* v. *Sixth Ward Building & Loan Ass'n*, 310 U.S. 32 (1940), the Court rejected a Contract Clause challenge to a state statute altering the scheme of regulation of a thrift. The Court held that the regulations governing the thrift had always remained "subject to the paramount police power." *Id.* at 38.

and other general provisions permitting FSLIC and the Bank Board "to extend assistance to acquirers of insolvent FSLIC-insured thrifts * * * and to set minimum capital limits on a case-by-case basis." App. 39a. Those provisions establish that FSLIC had authority to enter into assistance agreements. They may also establish that the then-existing regulatory agencies had the authority to grant capital forbearances.[7] The cited provisions do not, however, provide even a hint that Congress intended to grant FSLIC or the Bank Board the authority to commit Congress not to modify the governing statutes.[8] Nor do they suggest that FSLIC or the Bank Board had the authority to commit successor agencies operating under a new set of statutory requirements to permit thrifts to calculate their capital in a way that Congress had made illegal.[9] Compare *OPM* v.

---

[7] The FSLIC could not grant financial assistance to thrifts if the amount of assistance would be greater than the cost of liquidating the institution. See 12 U.S.C. 1729(f)(4)(A) (1988) (now repealed). In light of that provision, it is highly unlikely that the FSLIC had authority to enter binding contracts whereby the United States would assume a risk, if Congress later changed thrift capitalization rules, of having to pay contract breach damages that would exceed the cost of closing the thrift.

[8] To the contrary, as the D.C. Circuit noted, "the Bank Board statute, like the law in *POSSE*, contains an express reservation of '[t]he right to alter, amend or repeal this chapter." *Transohio Savings*, 967 F.2d at 623, quoting Section 30 of the Federal Home Loan Bank Act, ch. 522, 47 Stat. 741 (1932).

[9] Respondents were on notice that Congress could at any point affect their agreements by changing the regulatory scheme, as it had done so many times in the past. See note 1, *supra*; *Carteret*, 963 F.2d at 581 (noting the "massively

Richmond, 496 U.S. 414 (1990); *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 383-384 (1947).

3. The Federal Circuit also erred in finding the "sovereign acts" doctrine inapplicable here. Under that doctrine, parties to a contract are immune from liability for breach of contract when the government has acted in its sovereign capacity, regardless of whether such actions infringe existing contractual rights or create additional monetary burdens on private parties who have contracted with the government. See *Horowitz* v. *United States*, 267 U.S. 458, 461 (1925).

Thus, the United States is not liable on contract damage theories if the act that precluded the government's performance was "public and general," and not taken merely to avoid obligations to a particular party. See *Deming* v. *United States*, 1 Ct. Cl. 190, 191 (1865), appeal dismissed, 76 U.S. 145 (1870). See, *e.g.*, *Atlas Corp.* v. *United States*, 895 F.2d 745, 754-755 (Fed. Cir.), cert. denied, 498 U.S. 811 (1990); *Tony Downs Foods Co.* v. *United States*, 530 F.2d 367 (Ct. Cl. 1976); *Amino Brothers Co.*, 372 F.2d at 491. FIRREA is a "public and general" statute for these purposes; it was a comprehensive overhaul of the regulation of an entire industry for the protection of depositors nationwide in order to benefit the general welfare. The provisions of FIRREA imposing capital requirements did not merely affect thrifts that had

regulated banking industry, where the rules of the game change with some regularity"); *Charter Federal*, 976 F.2d at 212 (explaining that since "[c]apital requirements have been an evolving part of the regulatory scheme since its inception," the Bank Board "would have expected changes in statutory requirements, including capital requirements").

allegedly obtained commitments from the regulatory agencies to permit them to count supervisory goodwill or capital credits as capital. They sharply curtailed the ability of any thrift to count intangible assets as capital, regardless of whether those assets had ever been at issue in any arrangement with federal regulators. The pivotal question in determining whether a legislative action is a "public and general act" under the sovereign acts doctrine is not whether a particular party is affected by the governmental action at issue; it is whether the effect on a particular party or parties is an incidental effect of a new law enacted to govern government regulatory policy generally and to advance the general welfare.[10]

The Federal Circuit concluded that the sovereign acts doctrine is inapplicable here because "the relevant sections of FIRREA are not public and general sovereign acts." App. 39a. In the court's view, that conclusion followed from certain provisions of FIRREA that specifically refer to thrifts in respondents' position and that therefore amount to legislation that is not "public and general" but whose "principal effect is to abrogate specific contractual rights." App. 40a.

The FIRREA "transition rule[s]," App. 42a, to which the court of appeals referred make limited

[10] Application of the sovereign acts doctrine here is consistent with this Court's rulings in *Lynch* v. *United States*, 292 U.S. 571 (1934), and *Perry* v. *United States*, 294 U.S. 330 (1935). As this Court stated in *POSSE*, those "decisions * * * held that Congress does not have the power to repudiate its own debts, which constitute 'property' to the lender, *simply in order to save money*." *POSSE*, 477 U.S. at 55 (emphasis added).

exceptions to some of FIRREA's restrictions on the use of goodwill for thrifts in respondents' position. As the Federal Circuit conceded, the rules therefore undeniably placed respondents in a *better* position than other thrifts and in a better position than they would have been had no such exceptions been made: "[t]he statute plainly singles out supervisory goodwill for special treatment, *albeit treatment less harsh than other forms of intangible assets.*" App. 42a (emphasis added). The fact that transition rules in the statute granted respondents a partial exception from more generally applicable restrictions could not possibly mean that the restrictions themselves were not "public and general acts."

4. These cases warrant review by this Court because they involve the important legal principles discussed above, which will govern the result in approximately 100 other pending cases. The issues raised here are present in cases pending in the Ninth Circuit and in at least three district courts,[11] as well as in more than 90 cases currently stayed in the Court of Federal Claims awaiting a ruling here. The pending cases involve thrifts that booked goodwill totalling more than $8.5 billion and capital credits totalling more than $1.5 billion.

In addition, the Federal Circuit has refused to apply the unmistakability doctrine in other federal contract contexts. See *Hughes Communications Galaxy, Inc.* v. *United States*, 998 F.2d 953, 958 (Fed. Cir. 1993). At the same time, the doctrine is being used by other

[11] *Trinity Ventures* v. *FDIC*, Nos. 92-35597, 92-36535 (9th Cir.); *RTC* v. *Gravee*, No. 94 C 4589 (N.D. Ill.); *FDIC* v. *Maco Bancorp*, No. 94-1923 (D.D.C.); *FDIC* v. *First Heights Bank, FSB*, No. 95-72722-DT (E.D. Mich.).

circuits in varying circumstances to deny claims of contract rights against the government. See, *e.g.*, *Education Assistance Corp.* v. *Cavazos*, 902 F.2d 617, 629 (8th Cir.), cert. denied, 498 U.S. 896 (1990) (applying doctrine to changes in rules governing student loan program); *Western Fuels-Utah, Inc.* v. *Lujan*, 895 F.2d 780, 789 (D.C. Cir.), cert. denied, 498 U.S. 811 (1990) (applying doctrine to mining lease claims). Further review is warranted to clarify the circumstances under which the unmistakability doctrine applies.

Finally, the fact that these cases were before the Federal Circuit on an interlocutory appeal does not detract from the appropriateness of review by this Court now. Unless the legal rulings by the Federal Circuit are reversed, these cases will move forward to trials regarding damages; presumably, the more than 90 other cases in the Court of Federal Claims will also proceed to trial. Determining the proper measure of damages will be an extremely complicated, expensive, and time-consuming matter because the parties have very different views on this issue and the circumstances of each thrift vary greatly. Thus, the further proceedings in the trial court will require massive and expensive discovery and trials. That expense and the considerable drain on scarce judicial resources may be saved if these cases are reviewed now by this Court on the liability issues. No further factual record is necessary since the trials to be held in these three cases will focus solely on the measure of damages.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

JAMES A. FELDMAN
Assistant to the Solicitor General

DOUGLAS LETTER
JACOB M. LEWIS
SCOTT R. MCINTOSH
Attorneys

DECEMBER 1995

Supreme Court, U.S.
FILED

95 • 865 DEC 1 1995

No. OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

WINSTAR CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

JAMES A. FELDMAN
Assistant to the Solicitor General

DOUGLAS LETTER
JACOB M. LEWIS
SCOTT R. MCINTOSH
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

TABLE OF CONTENTS

	Page
Appendix A (Opinion of court of appeals (August 30, 1995))	1a
Appendix B (Opinion of court of appeals on rehearing (August 18, 1993))	53a
Appendix C (Opinion of United States Claims Court (July 24, 1992))	106a
Appendix D (Opinion of United States Claims Court (April 21, 1992))	153a
Appendix E (Order of United States Claims Court (February 21, 1992))	181a
Appendix F (Order of United States Claims Court (July 27, 1980))	183a
Appendix G (Statutory provision and regulations)	196a

APPENDIX A

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

No. 92-5164

WINSTAR CORPORATION, UNITED FEDERAL SAVINGS BANK, STATESMAN SAVINGS HOLDING CORP., THE STATESMAN GROUP, INC. AND AMERICAN LIFE AND CASUALTY INSURANCE COMPANY,

AND

GLENDALE FEDERAL BANK, FSB, PLAINTIFFS-APPELLEES

V.

THE UNITED STATES, DEFENDANT-APPELLANT

AUGUST 30, 1995

OPINION

BEFORE: ARCHER, *Chief Judge*,* and RICH, NIES, NEWMAN, MAYER, MICHEL, PLAGER, LOURIE, CLEVENGER, RADER, and SCHALL, *Circuit Judges*.**

Opinion for the court filed by Chief Judge ARCHER, in which Circuit Judges RICH, NEWMAN, MAYER,

---

* Chief Judge Archer assumed the position of Chief Judge on March 18, 1994.

** Circuit Judge Bryson joined the Federal Circuit on October 7, 1994, and has not participated in the disposition of this appeal.

MICHEL, PLAGER, CLEVENGER, RADER, and SCHALL join. Dissenting opinions filed by Circuit Judges NIES, and LOURIE.

ARCHER, *Chief Judge.*

The United States appeals the decisions[1] of the United States Court of Federal Claims[2] granting plaintiffs Winstar Corporation and United Federal Savings Bank, No. 90-8C, plaintiffs Statesman Savings Holding Corporation, the Statesman Group Incorporated and American Life and Casualty Company, No. 90-773C, and plaintiff Glendale Federal Bank, No. 90-772C, summary judgment on the liability portion of their breach of contract claims against the United States. The cases were consolidated for purposes of this interlocutory appeal. We affirm.

I

In its *Winstar* decisions, the Court of Federal Claims found that an implied-in-fact contract existed between the government and Winstar and that the government breached this contract when Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub.L. No.

---

[1] *Winstar Corp. v. United States*, 21 Cl.Ct. 112 (1990) (finding an implied-in-fact contract but requesting further briefing on contract issues) (*Winstar I*); 25 Cl.Ct. 541 (1992) (finding contract breached and entering summary judgment on liability) (*Winstar II*); *Statesman Savings Holding Corp. v. United States*, 26 Cl.Ct. 904 (1992) (granting summary judgment on liability to Statesman and Glendale).

[2] The Federal Courts Administration Act of 1992, Pub.L. No. 102-572, § 902(a), 106 Stat. 4506, 4516, changed the name of the former United States Claims Court to the "United States Court of Federal Claims." Except where the context requires otherwise, we refer to the trial court by its new name.

101-73, 103 Stat. 183 (codified in relevant part at 12 U.S.C. § 1464). Similarly, in the *Statesman* decision the Court of Federal Claims found that plaintiffs Statesman Savings Holding Corporation, the Statesman Group Incorporated and the American Life and Casualty Insurance Company (together "Statesman") and plaintiff Glendale Federal Bank ("Glendale") had express contracts with the government and citing its *Winstar* decision, found that these contracts were breached by the enactment of FIRREA.

The Court of Federal Claims certified its decisions in these three related cases for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) after determining that the decisions involved controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the termination of these and other related cases. We granted the appeal. 979 F.2d 216 (Fed.Cir.1992). After an initial split panel decision of this Court reversed the Court of Federal Claims, 994 F.2d 797 (Fed.Cir.1993), we vacated the panel opinion and agreed with the plaintiffs' suggestion to consider these cases in banc.

II

A. During the Great Depression of the 1930s, 40 percent of the nation's $20 billion in home mortgages went into default, 1700 of the approximately 12,000 thrift institutions failed, and depositors in these thrifts lost $200 million. H.R. Rep. No. 54(I), 101st Cong., 1st Sess. 292 (1989), *reprinted* in 1989 U.S.C.C.A.N. 86, 88-89 (House Report). Congress took several measures in response. First, Congress created the Federal Home Loan Bank Board (Bank Board) to channel funds to thrifts in order to prevent

foreclosures and to allow thrifts to make loans on residences. House Report at 292, 1989 U.S.C.C.A.N. at 88; see Federal Home Loan Bank Act, Pub.L. No. 72-304, 47 Stat. 725 (1932) (codified as amended at 12 U.S.C. §§ 1421-1449 (1988)). Next, Congress added the Home Owners' Loan Act, which authorized the Bank Board to charter and regulate federal savings and loan associations. Pub.L. No. 73-43, 48 Stat. 128 (1933) (codified as amended at 12 U.S.C. §§ 1461-1468 (1988)). Then, to further restore public confidence in thrift institutions, Congress in the National Housing Act of 1934 provided federal deposit insurance for depositors. Pub.L. No. 73-479, 48 Stat. 1246 (1934) (codified as amended at 12 U.S.C. §§ 1701-1750g (1988)). This act also established the Federal Savings and Loan Insurance Corporation (FSLIC), an agency under the Bank Board's authority that regulated all federally insured thrifts.

Among the regulatory requirements promulgated and enforced by the agencies were capital requirements, which were minimum reserves of capital that a thrift had to maintain. Failure to comply with minimum regulatory capital requirements had severe repercussions for a thrift. The agencies had a variety of measures that could be taken against noncomplying thrifts. In the most serious cases, the government could seize the thrift and place it into receivership where it might later be sold or liquidated. This drastic remedy was rarely necessary, however, because of the relative health of the thrift industry until the thrift crisis of the late 1970s and early 1980s.

In the late 1970s and early 1980s high interest rates resulted in sharply higher costs of funds for thrifts.

The thrifts' main assets were long-term, fixed-rate mortgages taken during times of lower interest rates. As a result, the revenues produced by these mortgages were exceeded by the rapidly rising costs of attracting short-term deposits. Thrifts that were locked into long-term low interest rate loans simply could not meet their deposit obligations. This interest rate mismatch was one of the principal causes of numerous thrift failures. Eighty-one thrifts failed in 1981, 252 in 1982, and 102 in 1983. House Report at 296, 1989 U.S.C.C.A.N. at 92.

With all of these bank failures and the likelihood of more occurring, the FSLIC faced deposit insurance liabilities that threatened to exhaust its insurance fund. *See Olympic Fed. Sav. & Loan Ass'n v. Director, OTS*, 732 F.Supp. 1183, 1185 (D.D.C.1990). As an alternative to liquidating failing thrifts and expending the FSLIC's insurance funds, the Bank Board and FSLIC encouraged healthy thrifts to merge with the failing ones. In these supervisory mergers, the regulators provided direct assistance and other incentives necessary for the healthy thrifts to maintain their financial well-being after the mergers and in this way the regulators tried to avoid paying off the failing thrifts' deposits out of the FSLIC's insurance fund. Among the incentives offered by the FSLIC and the Bank Board was the use of the purchase method of accounting under which "supervisory goodwill" resulting from the merger would be treated as satisfying part of the merged thrift's regulatory capital requirements. *See* Bank Board Memorandum R-31b (1981). Another incentive was the use of "capital credits" that also could be counted toward the regulatory capital requirements.

The purchase method of accounting is a generally accepted accounting practice (GAAP) for mergers, which accounts for the surplus of the purchase price over the fair market value of the acquired organization as goodwill, an intangible asset. As explained by the Court of Federal Claims:

> Under [the purchase method of accounting,] . . . the book value of the acquired thrift's assets and liabilities was adjusted to fair market value at the time of the acquisition. Any excess in the cost of the acquisition (which included liabilities assumed by the acquirer) over the fair market value of the acquired assets was separately recorded on the acquirer's books as "goodwill." . . . Goodwill was considered an intangible asset that could be amortized on a straightline basis over a number of years.

Winstar I, 21 Cl.Ct. at 113. In the context of a supervisory merger, the difference between the fair market value of the failing thrift's liabilities assumed by an acquirer and the fair market value of the failing thrift's assets was considered "supervisory goodwill." The Bank Board and the FSLIC allowed the merged thrifts to count this supervisory goodwill toward the minimum regulatory capital requirements and to amortize this goodwill over periods of up to 40 years. This permitted the healthy thrift to assume the deposit liabilities of the failing thrift and to maintain capital compliance without having to put up large amounts of its own money and without requiring large amounts of monetary assistance from the government.

The capital credits incentive used by the Bank Board and the FSLIC to encourage mergers with failing thrifts involved the FSLIC's contribution of

cash to the merged thrifts. The regulators allowed a portion or all of this cash contribution to be treated as partial satisfaction of the merged thrift's regulatory capital requirements. In addition, this cash contribution in some instances would not be treated as an asset in determining supervisory goodwill generated by the merger.

Allowing acquirers of failing thrifts to treat supervisory goodwill and capital credits as regulatory capital stimulated many acquisitions that would otherwise not have taken place because of the difficulty of meeting the minimum capital requirements. Indeed this was the precise intention of the Bank Board and FSLIC—supervisory mergers could not have occurred without the approval by the regulatory agencies of these accounting treatments. As former Bank Board Chairman Richard Pratt stated in testimony before Congress:

> The Bank Board was caught between a rock and a hard place. While it did not have sufficient resources to close all insolvent institutions, at the same time, it had to consolidate the industry, move weaker institutions into stronger hands and do everything possible to minimize losses during the transition period. Goodwill was an indispensable tool in performing this task. The GAAP approach to purchase method accounting mergers provided a bridge which allowed the Bank Board to encourage the necessary consolidation of the industry, while at the same time husbanding the financial resources which were then available to it.

Savings and Loan Policies in the Late 1970s and 1980s: Hearings Before the House Comm. on

Banking, Finance and Urban Affairs, 101st Cong., 2d Sess., No. 176, at 227 (1990).

B. Winstar, Statesman and Glendale acquired insolvent, failing thrifts under this policy of encouraging thrift mergers. In each case, they received the government's approval and assistance. In each case, the government saved millions of dollars that it would have had to pay to the insured depositors if the failing thrifts had been liquidated instead of being acquired.

1. In September of 1981, Glendale Federal Bank was approached by First Federal Savings and Loan Association of Broward County (Broward) about a possible merger. Glendale was a federal savings and loan association based in California. It was a profitable thrift, which was in full regulatory compliance. Broward was a federal savings and loan association based in Florida that had incurred significant losses. Broward's liabilities exceeded its assets by approximately $734 million. Glendale submitted a merger proposal to the FSLIC. Glendale proposed to use the purchase method of accounting to record the supervisory goodwill resulting from this accounting as an intangible asset amortizable over periods up to 40 years. After lengthy negotiations over the terms and conditions, the FSLIC agreed to provide assistance to the merged entity and to recommend approval of the merger transaction to the Bank Board.

In its resolution approving the merger plan between Glendale and Broward, the Bank Board imposed the condition that Glendale provide an opinion letter satisfactory to the Board's supervisory agent from its independent accountants justifying the use of the purchase method of accounting, specifically describ-

ing any goodwill arising from the merger, and substantiating the reasonableness of the amounts attributable to goodwill and the resulting amortization periods and methods. The Bank Board resolution also gave the FSLIC authority to enter into a Supervisory Action Agreement (SAA) with Glendale. The SAA with Glendale was signed in November of 1981 and Glendale promptly consummated its merger with Broward. As required by the Bank Board resolution, Glendale later provided its accountants' justification and opinion letter satisfactory to the Bank Board, which stated that "$18,000,000 of the resultant goodwill . . . will be amortized on a straight line basis over 12 years" and that the "remaining goodwill of $716,666,000 will be amortized on a straight line basis over 40 years." By the government's estimates, the Glendale-Broward merger saved the government approximately three quarters of a billion dollars.

2. In 1987 Statesman approached the FSLIC about acquiring a subsidiary of an insolvent state-chartered FSLIC insured savings and loan in Florida, First Federated Savings Bank (First Federated). The FSLIC responded to the inquiry by indicating that Statesman would have to acquire all of First Federated if the government was to assist. Further, it would require that Statesman's acquisition of First Federated be combined with the acquisition of three other financially troubled thrifts in Iowa.[3] After a year of negotiating the FSLIC and Statesman agreed

---

[3] The three thrifts were First Federal Savings Bank of Waterloo, Iowa, Peoples Federal Savings and Loan Association of Waterloo, Iowa, and Perpetual Savings and Loan Association of Waterloo, Iowa.

on the terms of a complex plan whereby Statesman would acquire the four thrifts.

Like the merger of Glendale, Statesman's merger plan called for the use of the purchase method of accounting. The Statesman plan called for an investment by Statesman and its co-investor American Life and Casualty Company of $21 million into Statesman's Savings Holding Company, which in turn would purchase $21 million of stock in a newly-formed federal stock savings bank named Statesman Bank for Savings. The Statesman Bank for Savings would then merge with the four failing thrifts.

As part of the transactions, the FSLIC and Statesman entered into an Assistance Agreement calling for the FSLIC to provide a $60 million cash contribution to the Statesman Bank for Savings. Under the Assistance Agreement and the Bank Board Resolution approving the merger, $26 million of this cash contribution (including $5 million represented by a debenture that Statesman was required to pay back) was to be permanently credited to Statesman's regulatory capital (i.e., as a capital credit) for purposes of meeting minimum regulatory capital requirements. Statesman's merger is the only one of the three at issue in this appeal that involves a capital credit.

The Bank Board resolution permitted use of the purchase method of accounting. Supervisory goodwill arising from the merger acquisitions in the amount of $25.8 million was recognized as a capital asset for purposes of meeting regulatory capital requirements and Statesman was allowed to amortize that goodwill over 25 years. The Bank Board granted authority to the FSLIC to enter into the Assistance Agreement

with Statesman and required Statesman to provide an opinion letter from its independent accountants to justify its use of the purchase method of accounting and supervisory goodwill. Statesman provided the opinion letter to the agency's satisfaction. By the government's estimates, the cost of the Statesman merger to the government was $50 million less than the cost of liquidating the four thrifts.

3. In 1983 a Minnesota-based thrift, Windom Federal Savings and Loan Association (Windom), was in danger of failing. The board of directors of Windom determined that its failure could not be avoided without assistance from the FSLIC. The FSLIC estimated that liquidating the federally insured thrift could cost $12 million dollars and it pursued an alternative to paying this money out of its insurance fund. It chose to solicit bids for the acquisition of Windom.

Winstar Corporation was a holding company formed by investors for the purpose of acquiring Windom. Winstar in turn formed a new wholly-owned, federal stock savings bank, United Federal Savings Bank, to merge with Windom. Winstar's plan contemplated financing the merger by cash contributions by both the investors and the FSLIC. The plan also called for use of the purchase method of accounting and recording supervisory goodwill as an intangible asset which initially was to amortized over a period of 40 years (later changed to 35 years). After negotiating the terms with Winstar Corporation and its investors, the FSLIC recommended to the Bank Board that it approve the merger plan. The Bank Board approved the merger again subject to Winstar providing an opinion letter from its independent ac-

countants justifying the use of the purchase method of accounting and detailing the resulting supervisory goodwill. As a part of the transaction, FSLIC signed an Assistance Agreement with Winstar Corporation and the Bank Board issued a forbearance letter. The forbearance letter stated that intangible assets resulting from use of the purchase method of accounting "may be amortized . . . over a period not to exceed 35 years by the straight-line method." By the government's estimates, the Winstar-Windom merger saved the government $7 million over what liquidation of Windom would have cost.

C. In spite of these and similar actions taken by the Bank Board and the FSLIC, thrifts continued to fail and the public confidence in the thrift industry continued to erode during the late 1980s. In response to this crisis in the savings and loan industry, Congress in 1989 passed FIRREA. FIRREA substantially modified the overall thrift regulatory scheme. As pertinent here, it (1) abolished the FSLIC and transferred its functions to other agencies; (2) created a new thrift deposit insurance fund under the Federal Deposit Insurance Corporation (FDIC); (3) eliminated the Bank Board and replaced it with the Office of Thrift Supervision (OTS), an office within the Department of Treasury, and made the OTS Director responsible for the regulation of all federally insured savings associations and the chartering of federal thrifts; and (4) established the Resolution Trust Corporation (RTC), which was charged with closing certain thrifts. *See* 12 U.S.C. §§ 1437 note, 1441a, 1821.

Among the legislative reforms of FIRREA was the requirement that the OTS "prescribe and maintain

uniformly applicable capital standards for savings associations." 12 U.S.C. § 1464(t)(1)(a). In addition, Congress expressly restricted the continued use of supervisory goodwill to satisfy regulatory capital requirements.

FIRREA required federally insured thrifts to satisfy three new minimum capital standards: "tangible" capital, "core" capital, and "risk-based" capital. 12 U.S.C. § 1464(t). Under FIRREA supervisory goodwill could not be included at all in satisfying minimum tangible capital. The amount of supervisory goodwill that could be included in satisfying "core" capital decreased each year after FIRREA's enactment and was entirely phased out on December 31, 1994. Finally, thrifts were required to maintain "risk-based" capital in an amount substantially comparable to that required by the Comptroller of the Currency for national banks. 12 U.S.C. § 1464(t)(2)(C). Although supervisory goodwill could be used for this purpose, FIRREA limited its amortization to a period of no more than 20 years. 12 U.S.C. § 1464(t)(9)(B).

FIRREA did not specifically cover capital credits or otherwise exclude FSLIC cash contributions from capital for purposes of determining compliance with any of the minimum capital requirements. The OTS, however, equated capital credits with "qualifying supervisory goodwill" within the meaning of the statute and promulgated a regulation that treated capital credits in the same manner as supervisory goodwill. 12 C.F.R. § 567.1(w).

As a result of FIRREA and the OTS regulation, many thrifts that were previously in full compliance with the regulations on capital requirements failed to

satisfy the new capital standards and immediately became subject to seizure. Glendale initially remained in compliance with the three new capital standards of FIRREA even though it was required to exclude all the unamortized supervisory goodwill that resulted from its merger with Broward for purposes of calculating its tangible capital and was required to accelerate the amortization of supervisory goodwill in calculating its required core and risk-based capital requirements. However, Glendale had to implement costly new measures to compensate for the exclusion of much of its supervisory goodwill from regulatory capital. Later, in March 1992, Glendale fell out of compliance with the risk-based capital standard.

After FIRREA, Statesman immediately fell below the three new capital standards established by the Act. As a result, the OTS appointed the RTC as receiver for Statesman in July of 1990. Winstar also fell into noncompliance as soon as the FIRREA capital requirements became effective. Winstar was placed in receivership by the OTS in May of 1990.

D. The plaintiffs filed suit in the Court of Federal Claims alleging that under FIRREA the preclusion or limited availability to them of supervisory goodwill (and capital credits in the case of Statesman) for satisfying regulatory capital constituted a breach of contract or, in the alternative, a taking of their contract rights without compensation in violation of the Fifth Amendment. The plaintiffs claimed that the government was contractually obligated to recognize supervisory goodwill generated by the mergers (and capital credits) as an intangible capital asset for purposes of their compliance with minimum regulatory capital standards. The plaintiffs also claimed

that they were entitled to amortize that supervisory goodwill for the agreed periods established at the time of their acquisitions of failing thrifts. Under their contract claims, plaintiffs asserted that FIRREA, and the regulations thereunder, as applied to them, breached those contract obligations. All of the plaintiffs filed summary judgment motions on the issue of liability.

The government defended on the grounds that there were no contractual rights as alleged and that in any event the alleged agreements were subject to statutory and regulatory changes. Relying principally on *Bowen v. Public Agencies Opposed to Social Security Entrapment (POSSE)*, 477 U.S. 41, 106 S.Ct. 2390, 91 L.Ed.2d 35 (1986), the government argued that the thrifts impermissibly sought to enjoin Congress' power to legislate and the agencies' power to regulate. The government further argued that the sovereign acts doctrine, as stated in *Horowitz v. United States*, 267 U.S. 458, 461, 45 S.Ct. 344, 344-45, 69 L.Ed. 736 (1925), precluded recovery for any contractual rights breached by FIRREA.

The Court of Federal Claims granted summary judgment to the plaintiffs on the issue of liability under the contract claims and did not reach the constitutional takings claims. The court found that binding contracts were made between plaintiffs and the FSLIC in each of the three merger transactions. It held that these contracts were breached when the regulatory capital requirements of FIRREA, and the regulations, were applied to plaintiffs. The Court of Federal Claims distinguished *POSSE* on the grounds that the case did not involve bargained for contract rights but rather involved an entitlement program.

The court also distinguished *POSSE* because the relief sought was an injunction to prevent the government from acting in its sovereign capacity, whereas plaintiffs only claimed damages for breach of their contracts. Finally, the Court of Federal Claims found that FIRREA, in specifically limiting the use of supervisory goodwill that had previously been contractually authorized, was not a sovereign act but rather was aimed directly at thrifts with contracts like those of the plaintiffs. Thus, the court concluded that the government could not rely on the sovereign acts doctrine to shield it from liability.

III

We review the Court of Federal Claims' grant of summary judgment under a de novo standard of review, with justifiable factual inferences being drawn in favor of the party opposing summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513-14, 91 L.Ed.2d 202 (1986). On appeal both parties ask for entry of judgment in their favor based on the uncontested facts of record.

A. The Court of Federal Claims found that all the thrifts had contracts with the government that contained terms allowing the use of supervisory goodwill (and in Statesman's case, capital credits) to satisfy a portion of their regulatory capital requirements and that this intangible asset could be amortized over extended periods of time. In the Glendale and Statesman cases, the court determined there were express contracts with these terms, and in Winstar's case, that there was an implied-in-fact contract with these terms. The government initially contends that no such contractual terms existed.

Contract construction is a question of law that we review *de novo*. *Hughes Communications Galaxy, Inc. v. United States*, 998 F.2d 953, 957 (Fed.Cir. 1993). A principal objective in deciding what contractual language means is to discern the parties' intent at the time the contract was signed. *Arizona v. United States*, 575 F.2d 855, 863, 216 Ct.Cl. 221 (1978).

1. We agree with the Court of Federal Claims that the government had an express contractual obligation to permit Glendale to count the supervisory goodwill generated as a result of its merger with Broward as a capital asset for regulatory capital purposes. Similarly, as the trial court determined, under this agreement Glendale was entitled to amortize the major portion of that goodwill on a straight line basis for a period of 40 years, and the balance for 12 years.

The government contends that the FSLIC's SAA with Glendale is the only document evidencing Glendale's contract with the FSLIC and that it contains no promise relating to goodwill or its amortization. As noted by the Court of Federal Claims, however, Glendale's contract was not limited to the SAA itself, but also included the contemporaneous resolutions and letters issued by the FSLIC and the Bank Board. The SAA's integration clause provided:

> This Agreement, together with an interpretation thereof or understanding agreed to in writing by the parties, constitutes the entire agreement between the parties thereto and supersedes all prior agreements and understandings of the parties in connection herewith, *excepting only the Agreement of Merger and any resolutions or letters issued contemporaneously herewith by the [Bank Board] or the FSLIC*, provided, however,

> that in the event of any conflict, variance, or inconsistency between this Agreement and the Agreement of Merger, the provisions of this Agreement shall govern and be binding on all parties insofar as the rights, privileges, duties, obligations, and liabilities of the FSLIC are concerned.

(Emphasis added.)

One of these contemporaneous documents, which was relied on by the Court of Federal Claims, was Bank Board Resolution 81-710. The FSLIC needed the Bank Board's approval before it could enter into the SAA with Glendale and approve the merger. The FSLIC and Glendale had negotiated the terms of the Broward merger, including Glendale's proposed use of supervisory goodwill and Glendale's obligation to absorb Broward's deposit liabilities. After negotiating terms satisfactory to both parties, the FSLIC recommended to the Bank Board that it approve the merger and authorize the FSLIC to execute the SAA with Glendale.

Resolution 81-710 provided the Bank Board's approval, with certain conditions that Glendale was required to satisfy to the Bank Board's satisfaction, including the following:

> Not later than sixty days following the effective date of the merger, Glendale shall furnish an opinion from its independent accountant, satisfactory to the Supervisory Agent, which (a) indicates the justification under generally accepted accounting principles for the use of the purchase method of accounting for its merger with Broward, (b) specifically describes, as of the Effective Date, any goodwill or discount of assets arising from the merger to be recorded on Glendale's books, and (c) substantiates the reasonableness of amounts attributed to goodwill and the discount of assets and the resulting amortization periods and methods . . . .

The Resolution continued:

> Glendale shall submit a stipulation that any goodwill arising from this transaction shall be determined and amortized in accordance with [Bank Board] Memorandum R-31b . . . .

Memorandum R-31b (1981) was the Bank Board's "guidelines" on how an acquiring thrift could count the excess of the acquired thrift's purchase price over the acquired thrift's fair market value as an intangible asset under the purchase method of accounting.[4]

Thus, in Resolution 81-710, the Bank Board clearly evidenced its approval of the terms of the merger, including the terms that the purchase method of accounting would be employed in accounting for the

---

[4] The Memorandum provided that:

> An application from an association requesting approval for a business combination to be accounted for by the purchase method of accounting, from which intangible assets will result, should include a description of any resulting intangible assets and the plan for their amortization. This description should discuss the nature and results of management's analysis of the underlying intangible assets and the resulting amortization periods and methods.

In accordance with applicable accounting principles, the Memorandum limited the period of amortization to 40 years or less.

merger, that goodwill arising from the merger would be recorded on Glendale's books, and that such goodwill would be amortized for reasonable periods under reasonable methods, provided these accounting treatments were justified to the satisfaction of the Bank Board's supervisory agent. In this connection, the Court of Federal Claims observed:

> It is also uncontroverted that the government manifested its approval of the terms set forth in the opinion letter prior to the effective date of the Supervisory Action Agreement. In a letter from H. Brent Beesley, then-Director of FSLIC, to [Bank Board] dated November 19, 1981, FSLIC recommended the use of the purchase method of accounting for the merger. Beesley explicitly referred to a Peat, Marwick, Mitchell & Co. opinion letter dated November 10, 1981 setting forth the specific amount of supervisory goodwill projected to be amortized pursuant to the merger, assuming the use of the purchase method of accounting.

26 Cl.Ct. at 910.

After the merger, Glendale submitted the required letter from its independent accountants to the Bank Board's supervisory agent. The letter confirmed as of the date of closing the amount of goodwill resulting from the merger under the purchase method of accounting and reiterated the amortization periods and the amounts of goodwill to be amortized under each period.

> Pursuant to the provisions of the Agreement of Merger between [Glendale] and Broward dated November 20, 1981 and the Supervisory Action Agreement between [Glendale] and the Federal Savings and Loan Insurance Corporation (FSLIC) dated November 20, 1981, upon the effective date of November 20, 1981, [Glendale] accounted for the acquisition using the "Purchase Method" of accounting . . . .
>
> . . . .
>
> . . . $18,000,000 of the resultant goodwill is associated with the savings deposit base and will be amortized on a straight line basis over 12 years, the estimated life of the savings deposit base. The remaining goodwill of $716,666,000 will be amortized on a straight line basis over 40 years as [Glendale] believes that the remaining goodwill has an indefinite life since it is related to expansion of operations into an entirely new market area.

The letter further opined that the accounting and methodology for calculating supervisory goodwill were in accordance with generally accepted accounting principles. Glendale satisfied the conditions for merger approval set out in Resolution 81-710 by submitting both the independent accountants' opinion and the stipulation that the accounting was in accordance with Memorandum R-31b. Moreover, there is no dispute that these submissions were satisfactory to the Bank Board's supervisory agent as required by that Resolution.

We conclude based on all of the contemporaneous documents, which under the integration clause of the SAA collectively constituted the "Agreement" of the parties, that the Bank Board and the FSLIC were contractually bound to recognize the supervisory

goodwill and the amortization periods reflected in the approved accountants' letter. It is clear from the documents that this was the intent of the parties. Glendale consummated its merger with Broward on this understanding and in doing so saved the government hundreds of millions of dollars.

Our conclusion is supported by other evidence and by the circumstances surrounding the transaction. If the parties did not intend to use supervisory goodwill for regulatory capital purposes there would simply be no reason for the extensive negotiations and the conditions regarding its use. It is not disputed that if supervisory goodwill had not been available for purposes of meeting regulatory capital requirements, the merged thrift would have been subject to regulatory noncompliance and penalties from the moment of its creation.[5] Moreover, the recitals of the SAA state that "Glendale proposes to enter into an agreement of merger with [Broward]" and that Broward "is in danger of default and that the nature and/or amount of such assistance would be less than the losses FSLIC would sustain upon the liquidation of [Broward]." Without the use of supervisory goodwill, the merged thrifts would have been in a failing position resulting in the losses the FSLIC sought to avoid. Finally, it is appropriate to observe that no healthy thrift would consummate a transaction that immediately put it in regulatory noncompliance.

---

[5] Prior to the merger, Glendale was a healthy, fully capitalized thrift. Glendale asserts, and the government does not disagree, that after merging with Broward Glendale's regulatory net worth would have been negative $460 million if supervisory goodwill had not been counted as a capital asset.

We consider the government's argument that the Bank Board Resolution was merely a statement of "then-current prosecutorial and regulatory policy" to be of little significance. Once specific terms as to the amount of supervisory goodwill and its amortization periods under that regulatory policy were incorporated in a negotiated arm's length contract, both parties were bound to them. While it is true as the government argues that a statement of policy, for instance as set forth in Memorandum R-31b, could be changed (which it later was), the contract could not be changed except by mutual consent.

The government makes two additional arguments why the Court of Federal Claims' interpretation was wrong. First it contends that the SAA expired by its terms in November 1991, prior to the alleged breach. We view the expiration provision as only relating to executory provisions set out in the SAA, which obligated the FSLIC to make certain payments to the merged thrift for a limited period of time. This provision of the SAA in any event does not negate other obligations under the merger plan, including the specific time periods for amortization of goodwill.

The government's second argument is based on the clause contained in the SAA, which provides that: "Nothing in this Agreement shall require any unlawful action or inaction by either of the parties hereto." The government contends this clause contemplates possible future changes in the law. The proper reading of this clause, however, is that neither party is required to act to the extent that some portion of the contract inadvertently violated the law as it existed at the time the contract was entered into. In any case, the clause clearly is not an escape hatch

that allows the federal government to avoid performance of its contractual obligations without penalty by passing a law prohibiting its own performance.

2. The Statesman transaction involved the acquisition by merger of four failing thrifts, and thus the accompanying documentation was more complex than that in the Glendale transaction. The Court of Federal Claims determined an express contract existed between the plaintiffs and the government which permitted the use of supervisory goodwill and capital credits in meeting regulatory capital levels, and which established the amortization period for such goodwill. We agree.

In connection with the acquisition of the four thrifts, Statesman signed an Assistance Agreement with the FSLIC. The Assistance Agreement contained express terms that allowed capital credits to be used to satisfy regulatory capital. Not surprisingly, the Court of Federal Claims stated that "the government readily concedes that an express contract existed, at least in regard to the $26 million capital credit extended by the government to Statesman." 26 Cl.Ct. at 912. A similar concession has been made by the government in its appeal brief, which states:

> The terms of the Assistance Agreement provided that $26 million of that amount (the "capital credit") constituted RAP goodwill to be credited to Statesman's regulatory capital.

Thus, although the government maintains these terms were not insulated against changes in the law, there can be no doubt that contractual promises regarding capital credits were made.

The Statesman documents regarding the treatment of supervisory goodwill are, in substance, the same as those in the Glendale transaction. The Assistance Agreement contained an integration clause that incorporated contemporaneous resolutions of the Bank Board. The Bank Board's Resolution 88-169 approved the Statesman merger plan and authorized the FSLIC to enter into the Assistance Agreement. In contrast to the Glendale resolution, however, Resolution No. 88-169 expressly approved and described the accounting treatments to be used in the Statesman merger transaction, as follows:

> [T]he Acquisition and the Mergers shall be accounted for, and [Statesman] shall report to the Bank Board and the FSLIC, in accordance with generally accepted accounting principles prevailing in the savings and loan industry, as accepted, modified, clarified, or interpreted by applicable regulations of the Bank Board and the FSLIC, except to the extent of the following departures from generally accepted accounting principles:
>
> (a) Twenty-one million dollars of the initial contribution by the [FSLIC] to [Statesman], and five million dollars of the principal amount of the Subordinated Debenture issued to the FSLIC, pursuant to § 6 of the Assistance Agreement, shall be credited to the regulatory capital account of [Statesman]; and
>
> (b) The value of any unidentifiable intangible assets resulting from accounting for the Acquisition and the Mergers in accordance with the purchase method of accounting may be amor-

> tized by [Statesman] over a period not in excess of twenty-five (25) years by the straight line method.
> . . .

As stated in the government's appeal brief:

> The Bank Board resolution also permitted use of the purchase method of accounting for the acquisitions. Thus, Statesman was allowed to amortize $25.8 million more in supervisory goodwill for 25 years.

As it did in the Glendale transaction, the Bank Board reserved its approval of this accounting treatment until Statesman furnished within ninety days, "an analysis accompanied by a concurring opinion from its independent certified public accountants" which

> shall (a) specifically describe, as of the Effective Date, any intangible assets, including goodwill and the discount and premiums arising from the Acquisition and the Mergers, to be recorded on New Federal's books, and (b) substantiate the reasonableness and conformity with regulatory requirements of the amounts attributed to intangible assets, including goodwill and the discount and premiums, and the related amortization periods and methods . . . .

The government concedes that this condition was met to the Board's satisfaction.

We conclude that the government was contractually obligated to recognize the capital credits and the supervisory goodwill generated by the merger as part of the Statesman's regulatory capital requirement and to permit such goodwill to be amortized on a straight line basis over 25 years.

3. The Court of Federal Claims concluded that Winstar had an implied-in-fact contract that obligated the government to allow Winstar to treat supervisory goodwill as a capital asset for regulatory capital purposes to be amortized over a 35 year period. Because we are satisfied that an express agreement existed between the FSLIC and Winstar, on the same terms found by the Court of Federal Claims, we do not reach the question of whether there could also be an implied-in-fact contract.

In July 1984 Winstar entered into an Assistance Agreement with the FSLIC. The Assistance Agreement stated that "the purpose of this Agreement [is] to provide a means by which the failure of [Windom] may be prevented, the savers and other creditors of [Windom] may be protected against losses . . . , [United] and Winstar may receive the benefits and assume the risks contracted for, and expenses to [the FSLIC] may be reduced." While this purpose recognized there was a mutual exchange of benefits and risks in the agreement, Winstar's Assistance Agreement, like Glendale's SAA, did not directly cover the treatment of supervisory goodwill. Again, however, this Assistance Agreement contained an integration clause which made "the Merger Agreement and any resolutions or letters issued contemporaneously with [the Assistance Agreement]" part of the contract between the parties.

Among the documents evidencing the government's contractual obligation is a forbearance letter of the Bank Board issued in July of 1984 to the Winstar investors. The forbearance letter in the first paragraph states the purpose is to "confirm the understanding that," after which it proceeds to enumerate

several terms of the Winstar transaction. Paragraph 2 of those terms provides:

> For purposes of reporting to the Board, the value of any intangible assets resulting from accounting for the merger in accordance with the purchase method may be amortized by [Winstar] over a period not to exceed 35 years by the straight-line method . . . .

The other documentation in the Winstar transaction is substantially identical to that in the Glendale transaction with respect to accounting treatment for the merger. For example, there is a contemporaneous Bank Board resolution, Resolution 84-363, approving the Winstar merger and giving the FSLIC the authority to proceed. That resolution required Winstar to provide an opinion "from its independent public accountants, satisfactory to the Supervisory Agent and to the Office of Examinations and Supervision" describing the use of goodwill and substantiating its reasonableness and conformity with regulatory requirements. It is not contested that Winstar satisfied the conditions in Resolution 84-363 to the Bank Board's satisfaction.

We conclude that the documentation in the Winstar transaction establishes an express agreement allowing Winstar to proceed with the merger plan approved by the Bank Board, including the recording of supervisory goodwill as a capital asset for regulatory capital purposes to be amortized over 35 years. Other circumstances, such as those discussed above in connection with the Glendale transaction, are consistent with this conclusion and demonstrate that it was the intention of the parties to be bound by the accounting treatment for goodwill arising in the

merger. Likewise, we find the government's arguments regarding the expiration of the Assistance Agreement and the Agreement's "unlawful action" provision unpersuasive for the same reasons as in the Glendale transaction.

Finally, the government argues the Net Worth Maintenance Stipulation signed by Winstar required Winstar to abide by any changes in the law regarding regulatory capital. We agree to the extent the Stipulation requires Winstar to maintain its capital at levels set by the bank regulators. Winstar, like other thrifts, was bound to keep in compliance with banking regulations and laws regarding capital levels except to the extent the Bank Board expressly agreed to forbear from enforcing its regulations against it. This stipulation by Winstar to maintain its regulatory net worth at whatever level the regulators set does not, however, eclipse the government's own promise that Winstar could count supervisory goodwill in meeting the regulatory requirements with which it had promised to comply.

B. There can be little question that the application of FIRREA and the regulations thereunder to deny or restrict plaintiffs' contractual rights to use supervisory goodwill with the associated amortization periods, and for Statesman's capital credits, in partial satisfaction of their capital requirements was a breach of the FSLIC's and the Bank Board's agreements with them. FIRREA greatly reduced the amount of supervisory goodwill that could be used to meet regulatory capital requirements. *See* 12 U.S.C. § 1464(t). The OTS by regulation treated capital credits in the same manner as supervisory goodwill,

see 12 C.F.R. § 567.1(w), thereby restricting the use of such credits for regulatory capital purposes.[6]

Failure to perform a contractual duty when it is due is a breach of the contract. *Restatement (Second) of Contracts* § 235(2) (1981). The three plaintiff thrifts negotiated contracts with the bank regulatory agencies that allowed them to include supervisory goodwill (and capital credits) as assets for regulatory capital purposes and to amortize that supervisory goodwill over extended periods of time. When the plaintiffs satisfied the conditions imposed on them by the contracts, the government's contractual obligations became effective and required it to recognize and accept the purchase method of accounting for the mergers and the use of supervisory goodwill and capital credits as capital assets for regulatory capital requirements.

After FIRREA and its implementing regulations, the bank regulatory agencies limited these assets as acceptable regulatory capital and limited the amortization periods. As a result, Winstar and Statesman were immediately thrown into noncompliance with the new regulatory capital requirements and were seized by federal regulators within approximately six months. Glendale survived the new capital standards but at considerable detriment. We conclude the government failed to perform its contractual obligations under plaintiffs' contracts.

---

[6] Because we affirm the Court of Federal Claims' decision in this case, we need not reach the question of whether FIRREA contemplated that capital credits would be treated as a form of supervisory goodwill.

C. The government makes two additional arguments why the thrifts' claims must fail. It contends (1) that the contracts failed to secure unmistakably the government's contractual obligations in the face of legislative change (the "unmistakability doctrine") and (2) that the government's contractual obligations were relieved by the enactment of "public and general" legislation by the Congress (the "sovereign acts doctrine"). The Court of Federal Claims analyzed each of these arguments extensively in its opinions and found neither to be persuasive. We agree with, and adopt, the substance of these analyses. *See Winstar I*, 21 Cl.Ct. at 115-17; *Winstar II*, 25 Cl.Ct. at 544-53; *Statesman*, 26 Cl.Ct. at 916-24.

1. The government contends that interpreting the contracts at issue as guaranteeing certain accounting treatments in spite of Congress' enactment of FIRREA is a restriction on the government's power to legislate. The Supreme Court's decision in *POSSE*, 477 U.S. at 52, 106 S.Ct. at 2397 is cited for the proposition that in interpreting contracts to which the government is a party, the contract should not be construed as waiving the government's power to legislate unless it says so in unmistakable terms. In *POSSE* the Court, quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148, 102 S.Ct. 894, 907, 71 L.Ed.2d 21 (1982), stated:

> [W]e have emphasized that "[w]ithout regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." Therefore, contractual arrangements, including those to which a sovereign

> itself is party, "remain subject to subsequent legislation" by the sovereign.

POSSE, 477 U.S. at 52, 106 S.Ct. at 2397 (citations omitted). In its briefs on appeal and in the proceedings below, the government also relied heavily on the opinion of the District of Columbia Circuit in *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598 (D.C. Cir.1992). (As explained below, Transohio was modified by the District of Columbia Circuit after the in banc arguments in the instant cases.) Because none of the thrifts can point to express language in their contracts preserving their contractual rights in the face of legislative change, the government concludes that the contracts must yield to the later enacted FIRREA capital requirements.

The Court of Federal Claims in its first *Winstar* opinion, 21 Cl.Ct. at 115, viewed *POSSE* as being inapposite because the government "mischaracterize[s] the plaintiffs' claim as one which improperly seeks to bind the government's power to regulate." Rather, the court noted that plaintiffs sought only money damages, which did not implicate the government's power to regulate. Thereafter, in its *Winstar II* opinion considering the government's motion for clarification, the Court of Federal Claims held that *POSSE* did not preclude finding a binding contract that had been breached by the government, explaining its holding as follows:

> Contrary to the assertions of the government, the Court's holding in *POSSE* in no way precludes this court from finding the existence of a contract between the government and plaintiffs. As is evident from its opinion, the Court in *POSSE*

> recognized that the government has the power to enter into contracts which confer vested rights—rights which the government has a duty to honor. See *Perry v. United States*, 294 U.S. 330, 351 [55 S.Ct. 432, 435, 79 L.Ed. 912] (1935) ("To say that the Congress may withdraw or ignore [its] pledge, is to assume that the Constitution contemplates a vain promise, a pledge having no other sanction than the pleasure and convenience of the pledgor. This Court has given no sanction to such a conception of the obligations of our Government."); *Lynch v. United States*, 292 U.S. 571, 580 [54 S.Ct. 840, 844, 78 L.Ed. 1434] (1934) ("Congress was free to reduce gratuities deemed excessive. But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation.").
>
> In *POSSE*, however, unlike the case here, no such vested rights were created as the basic elements of contract formation were absent. In contracts involving the government, as with all contractual relationships, rights vest and contract terms become binding when, after arms length negotiation, all parties to the contract agree to exchange real obligations for real benefits. In *POSSE*, the Court determined that such vested contract rights did not exist. *POSSE*, 477 U.S. at 52, 54-55 [106 S.Ct. at 2396-97, 2397-98]. Although the Court did not explicitly so state, the facts of *POSSE* make it clear that the provisions of the original Social Security Act were not promulgated

> after negotiation, arms length or otherwise, between Congress and the plaintiffs who filed suit. As is the case with all legislation, the only "negotiations" or bargaining involved in the enactment of the original Social Security Act and its amendments took place in the halls of Congress. The "rights" at issue in *POSSE*, then, were solely government-created. They were really policy decisions made by the democratic political process. There was no legal consideration for the creation of these "rights." At any time, the government could revoke them *without legal consequence* because the plaintiffs had not bargained for their creation.

25 Cl.Ct. at 545-46 (footnotes omitted) (emphasis in original).

The Court of Federal Claims returned to the government's unmistakability argument again in its opinion in the Statesman case. By this time the District of Columbia Circuit had issued its opinion in *Transohio*, which the government argued supported the unmistakability argument it had made in *Winstar*.

In *Transohio*, the plaintiff was a healthy thrift that merged with a failing one upon signing an Assistance Agreement with the FSLIC. After FIRREA was enacted, Transohio sought a preliminary injunction to enjoin the government from applying FIRREA's provisions against the use of supervisory goodwill as regulatory capital. It argued that FIRREA would breach the government's Assistance Agreement and that there would be a taking of Transohio's property under the Fifth Amendment.

The D.C. Circuit affirmed the district court's denial of the injunction because Transohio was unlikely to succeed on the merits. *Transohio*, 967 F.2d at 601. While noting the district court had no jurisdiction over the breach of contract claims, the D.C. Circuit analyzed whether Transohio had any contractual property rights that were protected under the due process clause of the Fifth Amendment. *Id.* at 617. The court agreed there was a contract right for the treatment of goodwill, *id.* at 618 ("We think the documents strongly suggest that, in addition to money, the agencies gave Transohio some ability to count as regulatory capital the intangible assets created by its mergers."), but concluded that the unmistakability doctrine precluded an interpretation of the contract that would guarantee such treatment against legislative change. *Id.* at 620. Because the thrift's contract and taking claims were both dependent on the existence of a binding contract, the court stated there was no need to remand the case to consider the thrift's monetary claims in the Court of Federal Claims. *Id.* at 614.

The government argued to the Court of Federal Claims that *Transohio* was persuasive precedent against interpreting the thrift agreements as allowing recovery for contractual breach in the face of legislative change. The Court of Federal Claims was unpersuaded and criticized the *Transohio* court's use of the unmistakability doctrine as one of contract interpretation rather than one of contract creation.

> The purpose animating the unmistakability doctrine makes it clear that the doctrine controls how contractual rights with the government are *created*, *i.e.*, whether the government has agreed

in unmistakable terms to be contractually bound. The doctrine never has been understood as controlling, as the government has alleged in the *Winstar*-related cases, the effect of the government's breach of a contract. *See United States Trust Co. v. New Jersey*, [431 U.S. 1, 23, 97 S.Ct. 1505, 1518, 52 L.Ed.2d 92 (1977)] ("Th[e] [unmistakability] doctrine requires a determination of the State's power to create irrevocable contract rights in the first place, rather than an inquiry into the purpose or reasonableness of the subsequent impairment."). The doctrine solely goes to whether a party possesses contractual rights which are binding and for which damages may be given.

Thus, in *Winstar* and the instant cases, there has been little serious dispute that the government granted the acquiring thrifts, in the clearest possible terms, the right to certain types of regulatory capital treatment. Likewise, the acquiring thrifts have never contended in this court that the government is bound to specifically perform on this obligation. Rather, the dispute has primarily raged over the question of breach. Namely, whether the government must pay damages or provide restitution for its breach, or whether it is excused from such damages by an interpretation of *POSSE* or the sovereign acts doctrine. The historical understanding of the unmistakability doctrine is not applicable to this issue.

26 Cl.Ct. at 920.

We agree with the Court of Federal Claims' view on the unmistakability doctrine. The terms of a government contract, like any other contract, do not change with the enactment of subsequent legislation absent a specific contractual provision providing for such a change. Further, we conclude the Court of Federal Claims properly rejected the government's argument based on *POSSE* that its sovereign power to legislate is at issue here. As the Court of Federal Claims observed:

> It is critical to this case . . . that plaintiffs are not claiming that the government contractually bound Congress not to change its regulations. Rather, plaintiffs claim that in their particular transaction with the government, it was agreed that they would be permitted to treat supervisory goodwill in a particular way for a fixed number of years. Thus, while Congress' power to regulate is not impaired, the government may be compelled to pay for the results of its actions, especially when in so doing the government actually is paying because it received a benefit.

Winstar I, 21 Cl.Ct. at 116.

The thrifts did not ask for, and the Court of Federal Claims could not provide, injunctive relief that would have enjoined the thrift regulators from applying the FIRREA requirements to the thrifts. *See Kanemoto v. United States Dep't of Justice*, 41 F.3d 641, 644 (Fed. Cir. 1994). Rather the thrifts sought money damages for breach of contract by the government. Money damages, in contrast to injunctive relief, presents little threat to the government's sovereign powers, other than the obvious financial incentive to honor its contracts. The Supreme Court's decision in

POSSE is predicated on the need to protect the sovereign's legislative power and that concern is inapplicable where money damages alone are at issue. *Hughes Communications*, 998 F.2d at 958 (distinguishing *POSSE* and other unmistakability cases as cases seeking to enjoin the sovereign power to legislate from cases in the Court of Federal Claims where the plaintiff seeks only money damages). In sum, Congress was always free to deem supervisory goodwill a bad idea and legislate it out of existence. Where that legislation breached the government's prior contractual obligations regarding the treatment of supervisory goodwill, however, the government remains liable in money damages for the breach.

Significantly, after the *Winstar* and *Statesman* cases were argued to this court sitting in banc, the D.C. Circuit in a later proceeding in the *Transohio* case reconsidered its earlier position. *See Transcapital Fin. Corp. v. Director, Office of Thrift Supervision*, 44 F.3d 1023 (D.C. Cir. 1995). The court recognized that its prior decision concerned only the denial of injunctive relief, and stated that its "analysis has no bearing one way or the other on the merits of [Transohio's] claim for *compensation* in the Federal Court of Claims [sic]." At 1026 (emphasis in the original). Thus the *Transohio* decision, as modified, complements our decision. In *Transohio*, the thrift sought to enjoin the government on the basis of its contractual rights and the court ruled it could not do so. In the present case, the thrifts seek only money damages with no request to enjoin the government. Accordingly, the sovereign's power to legislate is not here at issue, only money damages

because the FIRREA legislation has breached the contracts.

We are also persuaded, as the Court of Federal Claims held, that the Bank Board and the FSLIC, as the principal regulators of the thrift industry, were fully empowered to enter into the contracts at issue here. Since its inception, the FSLIC has had the power "[t]o make contracts." 12 U.S.C. § 1725(c)(3) (repealed). The FSLIC and its supervisory agency, the Bank Board, have had the authority both to extend assistance to acquirers of insolvent FSLIC-insured thrifts, 12 U.S.C. § 1729(f)(2)(A) (repealed), and to set minimum capital limits on a case-by-case basis, 12 U.S.C. § 1730(t)(2) (repealed). Although the FSLIC's authority to provide assistance could not exceed the cost of liquidating the thrift, in each of the transactions on appeal the government was saving millions of dollars over the cost of liquidation.

2. Finally, the government argues that FIRREA was a public and general sovereign act and that the government's contractual performance is excused when it is precluded by such an act. Citing the leading case on the sovereign acts doctrine, *Horowitz v. United States*, 267 U.S. 458, 461, 45 S.Ct. 344, 344-45, 69 L.Ed. 736 (1925), the government contends that FIRREA was a public and general act that excused its contractual performance. We agree, however, with the Court of Federal Claims that the relevant sections of FIRREA are not public and general sovereign acts. Therefore, the sovereign acts doctrine does not apply.

"[T]he United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its

public and general acts as a sovereign." *Horowitz*, 267 U.S. at 461 (citations omitted). The sovereign acts doctrine is a part of every contract with the government, whether the contract explicitly provides for it or not. *Hughes Communications*, 998 F.2d at 958. *Horowitz* makes clear that the sovereign acts doctrine is intended to level the playing field between the government and its contractors. "In this court the United States appear simply as contractors; and they are to be held liable only within the same limits that any other defendant would be in any other court. Though their sovereign acts performed for the general good may work injury to some private contractors, such parties gain nothing by having the United States as their defendants." *Horowitz*, 267 U.S. at 461, 45 S.Ct. at 345 (quoting *Jones v. United States*, 1 Ct.Cl. 383, 384, 1865 WL 1976 (1865)).

Not every governmental action, however, qualifies as a sovereign act within the meaning of the doctrine. Only those "public and general acts as a sovereign" qualify. While presumably all government action is enacted for the good of the public, government action whose principal effect is to abrogate specific contractual rights does not immunize the government from contractual liability under the doctrine. *Everett Plywood Corp. v. United States*, 651 F.2d 723, 731-32 (Ct.Cl. 1981); *Sun Oil Co. v. United States*, 572 F.2d 786, 817 (Ct.Cl. 1978). As noted by the Court of Federal Claims in its *Winstar II* decision:

> [W]here the government abrogates through a limited and focused action specific government obligations to a particular class of individuals or entities it has contracted with, the government is not afforded immunity. In these instances, the government acts not in its capacity as sovereign, but in its capacity as contractor.

25 Cl.Ct. at 551 (citations omitted).

The Court of Federal Claims determined with respect to the Winstar transaction:

> The pertinent sections of FIRREA at issue here, 12 U.S.C. § § 1464(t)(3)(A) and (9)(B), preclude the application of the sovereign acts doctrine. Their very purpose was to take away plaintiffs' rights to use supervisory goodwill because the Congress felt its use was no longer good policy. Courts assessing sovereign act claims have not granted immunity where the sole purpose of the government action is to reverse an earlier policy decision later deemed unwise.

Id. at 552 (citations and footnotes omitted). The government argues the Court of Federal Claims erred in concluding that the pertinent FIRREA sections were directed only at thrifts with agreements with the FSLIC. In its brief, the government contends "[t]he FIRREA goodwill restrictions apply to *all* thrifts, whether they previously had goodwill created or may undertake transactions that create goodwill in the future, and whether or not they had contracts assertedly freezing the prior regulatory treatment of goodwill." (Emphasis in original.)

The relevant provisions of FIRREA are 12 U.S.C. §§ 1464(t)(3)(A) and 1464(t)(9)(A)-(C). Section 1464(t)-(9)(A) defines "core capital" as that "defined by the Comptroller of the Currency for national banks, less any unidentifiable intangible assets. . . ." Goodwill is one form of an "unidentifiable intangible asset." An exception to the rule against intangible assets

being includable in core capital is set forth in the transition rule at § 1464(t)(3)(A). That section provides "[n]otwithstanding paragraph 9(A), an eligible savings association may include qualifying supervisory goodwill in calculating core capital." 12 U.S.C. § 1464(t)(3)(A). The section then provides a table that limits the amount of qualifying supervisory goodwill until it is totally phased out in 1995. Section 1464(t)(9)(C) provides the definition of "tangible" capital, which excludes all intangible assets, including supervisory goodwill. Section 1464(t)(9)(B) defines "qualifying supervisory goodwill" as supervisory goodwill existing on April 12, 1989 and limits the amortization period of qualifying supervisory goodwill to the shorter of 20 years or the remaining amortization period in effect on April 12, 1989.

The statute plainly singles out supervisory goodwill for special treatment, albeit treatment less harsh than other forms of intangible assets. Supervisory goodwill only results from a supervisory merger, a merger that necessarily required the participation of the FSLIC.[7] Thus, thrifts that underwent a supervisory merger, like appellants, are singled out for special treatment by the statute. The statute specifically limits their ability to include certain

[7] *See* House Report at 432, 1989 U.S.C.C.A.N. at 228:

> [T]he Committee intends the term "supervisory goodwill" to mean goodwill resulting from the acquisition, merger, consolidation, purchase of assets or other business combination of any savings association where the market value of the assets acquired was less than the market value of the liabilities at the time of the transaction and where the accounting treatment of the goodwill has been approved by the Federal Home Loan Bank Board.

assets in their calculation of capital. Although there is no doubt Congress passed this legislation out of concern about the use of "accounting gimmicks" behind the insured deposits, the legislation quite specifically abrogates agreements the government had made at an earlier time when it had suggested and approved the use of such "gimmicks" to avoid bailing out failing thrifts.

The legislative history behind FIRREA demonstrates that those debating the bill in Congress knew that some thrifts claimed to have contractual rights regarding the use of supervisory goodwill and that the subject provisions would breach those contracts. Three members of the House Committee on Banking, Finance and Foreign Affairs stated in response to the House version of FIRREA:

> Unfortunately, [FIRREA] was amended by the Full Committee to phase out the treatment of goodwill for capital purposes over a five year period. Simply put, the Committee has reneged on the agreements that the government entered into concerning supervisory goodwill.
>
> . . . Clearly, the agreements concerning the treatment of goodwill were part of what the institutions had bargained for. Just as clearly, the Committee is abrogating those agreements.

House Report at 498, 1989 U.S.C.C.A.N. at 293-94 (additional views of Reps. Annunzio, Kanjorski, and Flake). Representative Ackerman argued that "[FIRREA] would abrogate written agreements made by the U.S. Government to thrifts that acquired failing institutions by . . . no longer counting goodwill as capital after a 4-year transition period. In effect,

the Government is saying 'thanks for your help, but we don't need you anymore, so we're breaking our promise.'" 135 Cong.Rec. H2783 (daily ed. June 15, 1989). These remarks, which are by no means exhaustive, illustrate that many in Congress were concerned about FIRREA's repudiation of the supervisory goodwill promises made in the thrift agreements.

One of the dissents argues that because the pertinent sections were part of a "comprehensive piece of national legislation" enacted by Congress, the sections are general and public acts that excuse the government's contractual performance. We disagree. First, the portions of FIRREA at issue in this case are not any less directed at thrifts that had supervisory mergers because they are part of "comprehensive" legislation. By definition, the pertinent sections apply only to supervisory goodwill, which could only occur as a result of a supervisory merger, that was in existence on April 12, 1989. The legislation plainly singles out thrifts that underwent supervisory mergers for special treatment.

Second, we do not find the dissent's attempt to distinguish *Sun Oil* and *Everett Plywood* as cases limited to agency action persuasive. There is no reason to distinguish action by the legislative branch from that of the executive branch. Indeed, the agencies in the executive branch receive their power to enter into the contracts from the legislative branch. The contracts the agencies properly enter into are not binding only at the grace of the legislative branch. Thus the *Horowitz* case makes no distinction between the acts of the coordinate

branches of government. *See* 267 U.S. at 461 ("be they legislative or executive").

Finally, we know of no authority for this dissent's position that the government has a sovereign right to disavow its contractual obligations through comprehensive national legislation. Such a proposition is not supported by *Horowitz* and cannot be reconciled with the decisions of the Supreme Court in *Lynch v. United States*, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434 (1934) and *Perry v. United States*, 294 U.S. 330, 55 S.Ct. 432, 79 L.Ed.912 (1935). These decisions belie the notion that the government may repudiate its contracts by merely claiming it is acting in its "sovereign" capacity.

We accept, as did the Court of Federal Claims, that FIRREA was enacted for the public welfare—presumably all legislation is. We are convinced, however, that the FIRREA provisions at issue here targeted thrifts that had undergone supervisory mergers, financed in part with supervisory goodwill, with the approval and assistance of the federal government. Moreover, the undisputed reason for limiting the use of the supervisory goodwill was precisely the reason the government used it in the first place—it is a money equivalent, not money. The government has plainly sought to render its own performance impossible. This is not a public and general act. The sovereign acts doctrine does not apply.

CONCLUSION

There is nothing extraordinary about the contracts in these cases save for their subject matter and the potential liability to the government. It is well established that the government may enter into contracts with private individuals as parties. *See*

Perry v. United States, 294 U.S. 330, 353, 55 S.Ct. 432, 436, 79 L.Ed. 912 (1935) ("[T]he right to make binding obligations is a competence attaching to sovereignty.") (footnote omitted). Our decision is consistent with long standing precedent that when the government enters into such contracts, "its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Lynch v. United States*, 292 U.S. 571, 54 S.Ct. 840, 843, 78 L.Ed. 1434 (1934) (footnote omitted); *see also Perry*, 294 U.S. at 352, 55 S.Ct. at 435 ("When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments.").

We conclude the thrifts' contracts are enforceable against the government and that the government bargained to allow the thrifts to count certain intangible assets created in their mergers as capital assets for specified periods of time. The government later exercised its sovereign prerogative to enact legislation to limit the use of these intangible assets towards meeting capital requirements. Although the government was free to legislate, it remains liable for breach of contract where its legislation is directed at repudiating its prior contractual agreements. We conclude FIRREA repudiated the government's agreements with the plaintiff thrifts. Accordingly, we affirm the liability judgments of the Court of Federal Claims.

AFFIRMED.

NIES, *Circuit Judge*, dissenting.

Following *in banc* rehearing, additional briefing, and Chief Judge Archer's thoughtful opinion, I have reviewed my position in this appeal which is set out at 994 F.2d 797-813. However, I cannot agree that Congress "breached" contracts between the plaintiffs and the "government," that is, the Bank Board and FSLIC, by enacting FIRREA. The majority's holding impermissibly fuses "the two characters which the government possesses as a contractor and as a sovereign." *Horowitz* v. *United States*, 267 U.S. 458, 461, 45 S.Ct. 344, 69 L.Ed. 736 (1925). In my view, the plaintiffs can assert only a claim for an alleged taking of their property by the legislation, a claim which remains to be litigated. This is not a mere technicality. The amount of damages for a "taking" by legislation and for breach of contract are significantly different.

Further, I disagree that a breach of contract occurred even accepting that the Bank Board and the FSLIC were contractually bound to recognize supervisory goodwill* and particular amortization periods. While the regulators agreed to allow the thrifts to use their proposed accounting methods, that is as far as any contract with the "government" went. In the case of private parties, the burden of a change in the law is borne by the party on which it falls, unless

---

* The "purchase method of accounting," in some circumstances, may be "generally accepted accounting practice," but the thrifts could not use that practice to create nonexistent capital as a basis on which they could make loans. The bank regulators had to approve the practice for the thrifts to be able to use this practice for such purposes.

responsibility is otherwise assigned in the contract. Contracting parties in that situation "gain nothing by having the United States as their defendants." *Id.* As delineated in my prior opinion, no clause can be found in the contracts under which the Bank Board and the FSLIC promised to pay if Congress decided to step in and do away with the "purchase method of accounting," a euphemism for spinning straw into gold, and other accounting gimmicks. In this highly regulated industry, the thrifts did not negotiate contracts that freed them from the risk of a change in regulations.

No one forced the plaintiffs into the acquisitions of failing S & L's. Each acted voluntarily for the purpose of making money, a legitimate purpose, but not one the public must underwrite. It turned out for some that the bargains they struck were disastrous. That was due to their management's bad judgment, coupled with their decision to use the optional accounting practices.

I see no reason for reprinting my prior lengthy opinion to make minor editorial changes, *e.g.*, change "we" to "I" throughout. While vacated as a court decision, it remains in the books for anyone to read who may be interested. I will simply incorporate it here by reference.

LOURIE, *Circuit Judge*, dissenting.

I respectfully dissent.

I have no quarrel with the majority's conclusion that the government had a contractual obligation to permit the thrifts to count supervisory goodwill as regulatory capital and to accept the particular amortization periods. Moreover, there can be little doubt concerning the essential unfairness in Congress's denial of those contractual rights in its enactment of FIRREA.

However, I believe that the sovereign acts doctrine is a barrier to the thrifts' recovery under a breach of contract theory. In *Horowitz v. United States*, the Supreme Court held that "the United States when sued as a contractor cannot be held liable for an obstruction to the performance of [a] particular contract resulting from its public and general acts as a sovereign." *Horowitz v. United States*, 267 U.S. 458, 461, 45 S.Ct. 344, 69 L.Ed. 736 (1925). An embargo placed by the Railroad Administration on shipments of silk by freight did not obligate the government for breach of its contract to ship silk which the Ordnance Department had sold to the petitioner. This case is no different in principle.

The majority holds that the enactment of certain sections of FIRREA was not a "public and general" act because "legislation whose principal effect is to abrogate specific contractual rights does not immunize the government from contractual liability under the doctrine." In support of this principle, the majority cites *Everett Plywood Corp. v. United States*, 651 F.2d 723, 731-32 (Ct. Cl. 415 (1981) and *Sun Oil Co. v. United States*, 572 F.2d 786, 817 (Ct. Cl. (1978). The majority also quotes the Court of Federal

Claims' decision in *Winstar II* stating that the government is not afforded immunity when it "acts not in its capacity as sovereign, but in its capacity as contractor." *Winstar Corp. v. U.S.*, 25 Cl. Ct. 541, 551 (1992). In addition, the majority refers to *Lynch v. United States*, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434 (1934), and *Perry v. United States*, 294 U.S. 330, 55 S.Ct. 432, 79 L.Ed. 912 (1935).

Neither *Everett* nor *Sun Oil*, however, involved an act of general legislation as the asserted ground of contract breach. *Everett* dealt with an agency's termination of a single logging contract. The *Everett* court specifically stated that "[i]t would have been an entirely different case if Congress had passed a law immediately prohibiting all cutting in public forests." *Everett*, 651 F.2d at 732. Similarly, in *Sun Oil* the Secretary of the Interior denied a single drilling permit; there was no question of an alleged breach by legislation. In both *Everett* and *Sun Oil* the agency action was directed to a single contract, not all government contracts having a particular provision. Furthermore, unlike the legislation at issue in *Lynch* and *Perry*, FIRREA's change in the regulatory treatment of supervisory goodwill did not repudiate a debt of the United States. No authority of which I am aware suggests that a comprehensive piece of national legislation such as FIRREA is not a "public and general" sovereign act of government.

The majority, like the Court of Federal Claims, states that only certain sections of FIRREA are relevant to the issue at hand. Of course, defining the relevant governmental action narrowly focuses on the impact that FIRREA had on the particular parties before us. However, it also mischaracterizes the true nature of the governmental action. Congress did not

act only against certain thrifts or contracts; it acted to deal with the entire thrift system in order to save it. Doing so required dealing with the problem of underfunded thrifts to which the treatment of goodwill was integrally related.

Furthermore, I cannot see how Congress was acting in its contractual capacity, rather than in its role as sovereign, when it enacted FIRREA. The government was not buying goods or services when it acted. The legislation was intended to eliminate, nationally, practices that Congress thought were inconsistent with sound banking practice or that otherwise threatened the government's ability to insure the depositors of the thrifts. FIRREA, in fact, reshaped the entire thrift industry on a national level. Thus, one can hardly characterize Congress's act of passing FIRREA as "contractual" rather than sovereign. Moreover, the enactment of FIRREA was public and general; it was broadly directed to the good of the general public, to the country's financial system, rather than to a specific contract that it disapproved.

That some members of Congress argued that enactment of certain provisions of FIRREA would break promises made to the thrifts does not mean that Congress's passage of FIRREA was not a sovereign act; it only states the problem and indicates the understandable distress felt by those members. Nor do such statements overcome the government's sovereign right to enact comprehensive national legislation for the common good without liability for breach of particularly affected contracts. Thus, while the thrifts certainly were victimized when they made commitments in reliance on accounting treatment agreed to by the regulatory agencies, I am unable to

conclude that the government was powerless to enact appropriate legislation in order to restructure the U.S. thrift industry.

APPENDIX B

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

No. 92-5164

WINSTAR CORPORATION,
UNITED FEDERAL SAVINGS BANK,
STATESMAN SAVINGS HOLDING CORP.,
THE STATESMAN GROUP, INC.
AND AMERICAN LIFE AND CASUALTY INSURANCE COMPANY,

AND

GLENDALE FEDERAL BANK, FSB,
PLAINTIFFS-APPELLEES

v.

THE UNITED STATES, DEFENDANT-APPELLANT

May 25, 1993
ORDER GRANTING REHEARING AND REHEARING EN BANC AND AMENDING OPINION;
JUDGMENT VACATED AND OPINION WITHDRAWN
AUG. 18, 1993

Before: NIES, Chief Judge, RICH and NEWMAN, Circuit Judges.

NIES, Chief Judge.

In an opinion dated July 24, 1992, in Cases Nos. 90-773C and 90-772C, the United States Claims

Court[1] (Smith, C.J.) granted summary judgment in favor of plaintiffs Statesman Savings Holding Corp. and its affiliates and of plaintiff Glendale Federal Bank (FSB) on their breach of contract claims against the United States. Specifically, the court held that by enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub.L. No. 101-73, 103 Stat. 183 (codified in relevant part at 12 U.S.C. § 1464), the United States breached the contractual obligations of the Federal Home Loan Bank Board to the plaintiffs by changing regulatory capital standards.[2] The court then consolidated these cases with *Winstar Corp. v. United States*, No. 90-8C, and certified for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), its opinions granting summary judgment as to liability in the consolidated cases.[3] Having granted the government permission to appeal, 979 F.2d 216 (Fed.Cir.1992), we now reverse the judgment of liability on the breach of contract claims of all plaintiffs and remand for further proceedings consistent herewith.

I.

Much of the history of the savings and loan (or "thrift") industry consists of financial crisis followed

---

[1] Effective October 29, 1992, the United States Claims Court was renamed the "United States Court of Federal Claims" by the Federal Courts Administration Act of 1992, Pub.L. No. 102-572, § 902(a), 106 Stat. 4506, 4516 (1992).

[2] The court's opinion is reported at *Statesman Sav. Holding Corp. v. United States*, 26 Cl.Ct. 904 (1992).

[3] The court's opinion in the former case is reported as *Winstar Corp. v. United States*, 21 Cl.Ct. 112 (1990) ("*Winstar I*"), modified, 25 Cl.Ct. 541 (1992) ("*Winstar II*").

by regulatory response. During the Great Depression, 40 percent of the nation's $20 billion in home mortgages went into default, 1700 of approximately 12,000 thrifts failed, and thrift depositors lost roughly $200 million. H.R. Rep. No. 54(I), 101st Cong., 1st Sess. 292 (1989), *reprinted in* 1989 U.S.C.C.A.N. 86, 88-89 ("*House Report*"). In response, Congress created the Federal Home Loan Bank Board (Bank Board) and the Federal Savings and Loan Insurance Corporation (FSLIC) to provide deposit insurance and to regulate the previously unregulated thrift industry. *See* Federal Home Loan Bank Act, Pub.L. No. 72-304, 47 Stat. 725 (1932) (codified as amended at 12 U.S.C. §§ 1421-1449 (1988)); Home Owners' Loan Act of 1933, Pub.L. No. 73-43, 48 Stat. 128 (1933) (codified as amended at 12 U.S.C. §§ 1461- 1468 (1988)); and Title IV of the National Housing Act, Pub.L. No. 73-479, 48 Stat. 1246 (1934) (codified as amended at 12 U.S.C. §§ 1701-1750g (1988)). Pursuant to this and to subsequently enacted statutory authority, these agencies have "promulgated regulations governing 'the powers and operations of every Federal savings and loan association from its cradle to its corporate grave.'" *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 145, 102 S.Ct. 3014, 3017, 73 L.Ed.2d 664 (1982) (citing *California v. Coast Fed. Sav. & Loan Ass'n*, 98 F.Supp. 311, 316 (S.D.Cal. 1951)). During their corporate lifetimes, thrifts are subject to rules that restrict their lending and investment activities, impose reporting and record-keeping requirements, limit (at times) interest paid on deposits, and authorize their termination and burial by government-appointed receivers. In short, the thrift industry has become "one of the longest regulated and most closely supervised of public callings." *Cali-*

fornia Hous. Sec., Inc. v. United States, 959 F.2d 955, 958 (Fed.Cir.), cert. denied,—U.S.—, 113 S.Ct. 324, 121 L.Ed.2d 244 (1992) (quoting *Fahey v. Mallonee*, 332 U.S. 245, 250, 67 S.Ct. 1552, 1554, 91 L.Ed. 2030 (1947)). This regulation and reform has converted the thrift industry into what Congress has described as "a federally-conceived and assisted system to provide citizens with affordable housing funds." *House Report* at 292; 1989 U.S.C.C.A.N. at 88.

Since their creation, the Bank Board and FSLIC have set minimum capital requirements—the regulatory function that is of interest in this appeal. As the Congress noted in the Committee Report on FIRREA:

> A sound tangible capital base is fundamental in promoting the safety and soundness of individual institutions and ultimately the stability of our financial system. Those institutions that operate without real capital are only risking the taxpayers' funds. With solid capital, losses related to risky activities are absorbed by the institutions' owners. Absent real and tangible capital, the first dollar lost is essentially an insurance fund dollar—with the losses ultimately borne by the taxpayer.

House Report at 429, 1989 U.S.C.C.A.N. at 225. These requirements have been the subject of numerous statutory and regulatory changes over the years. *See* Garn-St. Germain Depository Institutions Act, Pub.L. No. 97-320, 96 Stat. 1469 (1982) (codified throughout 12 U.S.C.); Depository Institutions Deregulation and Monetary Control Act, Pub.L. No. 96-221, 94 Stat. 132 (1980) (codified throughout 12 U.S.C. and at 15 U.S.C. §§ 1601-67 (1988)); Emergency

Home Finance Act, Pub.L. No. 91-351, 84 Stat. 450 (1970) (codified throughout 12 U.S.C.). The regulations governing thrift capital reserve requirements changed three times in 1982 alone. See 47 Fed.Reg. 3543 (codified at 12 C.F.R. § 563.13); *id.* at 31859 (codified at 12 C.F.R. § 563.13); *id.* at 52961 (codified at 12 C.F.R. § 563.13).

The "First" S & L Crisis of the 1980's, and the Bank Board's Response

The Bank Board significantly changed its regulatory capital standards in the early 1980's, in response to what was then the most severe industry crisis since the Great Depression. High inflation, coupled with a shift in Federal Reserve policy from stabilizing interest rates to controlling the money supply, had caused a dramatic increase in interest rates with an equally dramatic increase in the cost of funds to thrifts. *House Report* at 294-95, 1989 U.S.C.C.A.N. at 90-91. This meant that the thrifts had to pay more money to attract funds than they were earning on their long-term, fixed-rate mortgage portfolios. *Id.* For example, in August 1981, 53 percent of the thrift industry's interest-bearing liabilities were in short-term certificates of deposit paying high market rates of interest, while 85 percent of its assets were long-term mortgages fixed at below market interest rates. *Id.* at 296, 1989 U.S.C.C.A.N. at 92. The result of this unfavorable interest rate mismatch is not surprising. Thrifts lost about $4.5 billion in both 1981 and 1982. Eighty-one thrifts failed in 1981, 252 failed in 1982, and 102 failed in 1983. *Id.* FSLIC faced deposit insurance liability that threatened to exhaust the insurance fund. *See* Beesley, *FSLIC 1981 Annual Report*, FHLBB J., April 1982, at 16.

In 1981, the Bank Board and FSLIC decided this problem could be alleviated with greater incentives for the acquisition of failing thrifts by profitable institutions. The Chairman of the Bank Board testified that such acquisitions would result in "lower ultimate costs" to the FSLIC insurance fund than would a program of liquidation and payment of insured deposits. *Competition and Conditions in the Financial System: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 97th Cong., 1st Sess., pt. 1, at 100 (1981). An important acquisition "incentive" provided by the Bank Board was a change in the regulatory accounting principles applied to thrift acquisitions to include several significant departures from generally accepted accounting principles (GAAP). Before the enactment of FIRREA, the Bank Board had broad discretion to prescribe the accounting standards used to measure compliance with its regulatory capital requirements. *See* 12 U.S.C. § 1467 (Supp. V 1987). These changes were later characterized by the Congress as "accounting gimmicks." *House Report* at 297-98, 1989 U.S.C.C.A.N. at 93-94.

One of these accounting gimmicks was "supervisory goodwill," a concept that is explained by the Claims Court's opinion in *Winstar I*.

> Under [the purchase method of accounting] . . . the book value of the acquired thrift's assets and liabilities was adjusted to fair market value at the time of the acquisition. Any excess in the cost of the acquisition (which included liabilities assumed by the acquirer) over the fair market value of the acquired assets was separately recorded on the acquirer's books as "goodwill." In

> other words, the government agreed to allow the plaintiffs and others in similar circumstances to treat what was a deficit in capital as an asset. Goodwill was considered an intangible asset that could be amortized on a straight-line basis over a number of years. The difference between the aggregate fair market value of liabilities assumed by the acquirer and the aggregate fair market value of the failing thrift's assets was known as "supervisory goodwill," in the context of a supervisory merger, and was recorded on the resulting institution's balance sheet as an asset includable in capital for purposes of satisfying [the Bank Board's] minimum capital requirements.

21 Cl.Ct. at 113. With a wave of the accountant's pen, liabilities could be magically converted into assets; and the worse off the acquired thrift, the more the "supervisory goodwill" that could be booked as a capital asset for purposes of meeting regulatory capital requirements.

The other practice involved in this appeal is "regulatory accounting practice" (RAP) goodwill. As the Court of Appeals for the Fifth Circuit explained:

> When FSLIC provided cash assistance to the acquiror in connection with the acquisition, GAAP would have required that the amount of the assistance be treated as an asset of the acquired thrift, increasing that thrift's net worth and correspondingly decreasing the amount of goodwill that otherwise would have been created in the acquisition. FHLBB departed from GAAP, however, by permitting some or all of FSLIC's cash assistance to be recorded as a credit to the

> acquired thrift's new worth, without requiring that the amount of pre- assistance goodwill to be reduced. An asset equaling the amount of GAAP goodwill that otherwise would have been lost was termed "RAP goodwill."

Security Sav. & Loan Ass'n v. Director, Office of Thrift Supervision, 960 F.2d 1318, 1320 n. 5 (5th Cir.1992). Essentially, the RAP goodwill device permitted a double counting of any FSLIC monetary contribution—once as tangible capital, once as "goodwill" capital.

Allowing potential acquirors of ailing thrifts to book the full amount of supervisory and/or RAP goodwill as a capital asset stimulated many acquisitions that would have otherwise run afoul of regulatory capital requirements. As former Bank Board Chairman Richard Pratt stated in testimony before Congress:

> The Bank Board was caught between a rock and a hard place. While it did not have sufficient resources to close all insolvent institutions, at the same time, it had to consolidate the industry, move weaker institutions into stronger hands and do everything possible to minimize losses during the transition period. Goodwill was an indispensable tool in performing this task. The GAAP approach to purchase method accounting mergers provided a bridge which allowed the Bank Board to encourage the necessary consolidation of the industry, while at the same time husbanding the financial resources which were then available to it.

Savings and Loan Policies in the Late 1970's and 1980's: Hearings Before the House Comm. on Banking, Finance and Urban Affairs, 101st Cong., 2d Sess., No. 176, at 227 (1990). Each of the plaintiffs in this appeal participated in acquisitions whose viability was premised upon the Bank Board's then approved accounting practices.

The Plaintiffs' Acquisitions of Failing Thrifts

Winstar (in combination with United Federal), Statesman (in combination with American Life and Casualty), and Glendale all acquired ailing thrifts under this program to encourage such acquisitions. Winstar and Statesman negotiated their acquisitions directly with the Bank Board and FSLIC;[4] Glendale's merger was expressly conditioned on FSLIC approval. In the Winstar and Statesman deals, the plaintiffs and FSLIC negotiated and fixed their respective cash contributions to the acquired thrift.[5] Pursuant to statutory authorization, 12 U.S.C. § 1464(d)(11) (1982), the Bank Board reviewed and approved all of the acquisitions, examining inter alia the thrifts' projected compliance with regulatory capital requirements, 12 C.F.R. §§ 546.2(h)(6), 563.13 (1982), in accordance with its accounting standards. 12 C.F.R. § 545.20 (1982).

Both Statesman and Winstar signed an "Assistance Agreement" with FSLIC. These agreements set

---

[4] In the case of Winstar, the acquired thrift had authorized the Bank Board to negotiate a merger or consolidation. In the case of Statesman, the acquired thrifts were all in FSLIC receivership.

[5] FSLIC contributed $5.5 million to the Winstar acquisition; Winstar contributed $2 million. FSLIC contributed $60 million to the Statesman acquisitions; Statesman contributed $21 million. FSLIC apparently made some cash contribution to the Glendale acquisition, but the specific amount is not of record.

forth FSLIC's promised monetary contribution and its other contractual responsibilities. None of these agreements expressly mention either purchase method accounting or supervisory goodwill. Both agreements, however, contain an "integration" clause which expressly incorporates any resolutions or letters of the Bank Board concerning the acquisition or merger in connection with its approval.

It is these letters and resolutions of the Bank Board that contain the only express reference to purchase method accounting or supervisory goodwill. On July 13, 1984, the Bank Board issued a "forbearance letter" confirming the following understanding respecting the Winstar acquisition: "For purposes of reporting to the Board, the value of any intangible assets resulting from accounting for the merger in accordance with the purchase method may be amortized by [United Federal] over a period not to exceed 35 years by the straight-line method." Similarly, in its March 11, 1988, resolution conditionally approving the Statesman acquisitions, the Bank Board acknowledged that "[t]he value of any unidentifiable intangible assets resulting from accounting for the Acquisition and the Mergers in accordance with the purchase method of accounting may be amortized . . . over a period not in excess of twenty-five (25) years by the straight line method." The "forbearance letter" issued to Statesman mentions the $26 million "regulatory capital" credit for FSLIC's cash contribution but not supervisory goodwill.

Glendale acquired its failing thrift (First Federal) in a different regulatory environment. Unlike the transactions involving Winstar and Statesman, this merger was negotiated between the thrifts without the participation of the Bank Board or FSLIC. However, the Merger Agreement signed by Glendale and First Federal was expressly conditioned upon FSLIC approval. Shortly after the Merger Agreement was signed, FSLIC and Glendale signed a "Supervisory Action Agreement" that approved the merger and provided for financial assistance from FSLIC. This contract also contained an "integration clause" that incorporated contemporaneous resolutions and letters of the Bank Board.

As in the case of Winstar and Statesman, the Bank Board issued resolutions and a forbearance letter but none of these expressly approve either purchase method accounting or supervisory goodwill. Resolution No. 81-710 does require that Glendale furnish a satisfactory accountant's opinion within 60 days of the merger's effective date which justifies the use of purchase method accounting, describes "any goodwill or discount of assets arising from the merger to be recorded on Glendale's books," and substantiates the reasonableness of amounts so booked and the resulting amortization periods and methods. Glendale was further obligated to submit a stipulation that any goodwill arising from the merger be determined and amortized in accordance with a Bank Board memorandum (R-31b) which describes its standards for the computation and use of supervisory goodwill arising from thrift mergers. On March 19, 1982, Glendale supplied the required opinion letter, setting forth its intention to amortize approximately $716 million of supervisory goodwill over a 40 year period and $18 million over 12 years. There is no evidence that the government regulators found this proposal unsatisfactory.

Supervisory goodwill was critical to all of these acquisitions. Even with the monetary contributions

of Winstar and FSLIC, the GAAP net worth of the thrift created by the Winstar transaction amounted to approximately a *negative* $6.7 million dollars. This capital shortfall was met by the $10.6 million in goodwill that was created by the purchase method accounting applied to this transaction. Similarly, the thrift created by the Statesman acquisitions was able to meet regulatory capital standards only because of the $25.8 million in supervisory goodwill and the $26 million regulatory capital credit generated in the transaction. The value of these "assets" is roughly equal to FSLIC's potential liability had the four failing thrifts that Statesman acquired been liquidated. In the case of Glendale, even with its capital reserve of $277 million and with FSLIC's contribution to the merger, the resulting thrift was left with an immediate GAAP capital deficiency of $460 million, which was met by more than $700 million of supervisory goodwill generated by the merger. Had either Winstar, Statesman, or Glendale been unable to count this goodwill as capital, its newly created thrift would have been subject to immediate liquidation.

The "Second" S & L Crisis of the 1980's and FIRREA

Subsequent to all these transactions, Congress enacted FIRREA. This sweeping reform of the thrift industry was compelled by the "precarious financial condition" of the FSLIC insurance fund and by waning consumer confidence in the savings and loan industry. *House Report* at 302, 1989 U.S.C.C.A.N. at 98. As of December 31, 1988, FSLIC was $56 billion in the red. *Id.* at 304, 1989 U.S.C.C.A.N. at 100. Consumer fears regarding the stability of the industry resulted in record withdrawals—$28.5 billion in the

first *quarter* of 1989, compared with a previous record *annual* withdrawal of $25 billion in 1980. *Id.* at 305, 1989 U.S.C.C.A.N. at 101.

Among the reforms implemented in FIRREA were the abolition of FSLIC and the Bank Board, with a transfer of FSLIC's insurance function to the Federal Deposit Insurance Corporation (FDIC) and a transfer of the Bank Board's regulatory function to the newly created Office of Thrift Supervision (OTS), under the supervision of the Department of the Treasury. *Id.* at 310, 1989 U.S.C.C.A.N. at 106. The abolition of the Bank Board was motivated in part by Congress's perception that the Bank Board's relaxed capital standards and sluggish regulatory enforcement, which contributed to the thrift crisis, were the product of an agency mission directed more toward promoting than toward regulating the industry. *Id.* at 302, 1989 U.S.C.C.A.N. at 98.

These capital standards were the target of specific legislation, and of congressional ire. Goodwill was described as "one of the remaining poisons of the savings and loan industry." 135 Cong.Rec. H2710 (daily ed. June 15, 1989) (statement of Rep. Price). As one member of Congress noted:

> Goodwill is not cash. It is a concept, and a shadowy one at that. When the Federal government liquidates a failed thrift, goodwill is simply no good. It is valueless. That means, quite simply, that the taxpayer picks up the tab for the shortfall.

Id. at H2571 (statement of Rep. Barnard). Intangible capital assets generated by the Bank Board's use of accounting gimmickry "masked the worsening financial condition of the industry, and the FSLIC, and

enabled many weak institutions to continue operating with an increasingly inadequate cushion to absorb future losses." *House Report* at 298, 1989 U.S.C.C.A.N. at 94. At the time FIRREA was enacted, supervisory goodwill accounted for $18 billion in regulatory capital. *Id.* at 497, 1989 U.S.C.C.A.N. at 293 (additional views of Reps. Annunzio, Kanjorski and Flake).

FIRREA charged OTS with developing and implementing "uniformly applicable capital standards for savings associations." 12 U.S.C.S. § 1464(t)(1)(A) (Law. Co-op.1992). But unlike previous legislation, FIRREA severely restricted the agency's discretion to set these standards, requiring a "leverage limit," a "tangible capital requirement," and a "risk-based capital requirement." *Id.* The "leverage limit" to be promulgated by OTS would require a thrift to "maintain core capital in an amount not less than 3 percent of [its] total assets." 12 U.S.C.S. § 1464(t)(2)(A). Similarly, OTS was obligated to set standards requiring thrifts "to maintain tangible capital in an amount not less than 1.5 percent of . . . total assets," 12 U.S.C.S. § 1464(t)(2)(B), and to meet risk-based capital requirements that were not materially lower than those applicable to national banks. 12 U.S.C.S. § 1464(t)(2)(C). FIRREA expressly excluded intangible assets such as goodwill from its definition of "tangible capital." 12 U.S.C.S. § 1464(t)(9)(C). It also expressly limited the quantity of supervisory goodwill (expressed as a percentage of total assets) that could be included in "core capital," gradually reducing the allowed percentage to zero by the end of 1994, 12 U.S.C.S. § 1464(t)(3), and limiting to twenty years the amortization period in the interim. 12 U.S.C.S. § 1464(t)(9)(B). Subsequently, OTS promulgated capital

regulations that included a similar phase-out schedule for the risk-based capital standards. 12 C.F.R. § 567.6(a) (1991).

With the passage of FIRREA, Winstar, Statesman, and Glendale had serious difficulties meeting the new statutory capital requirements. Both Winstar and Statesman are now in receivership.[6] Glendale avoided noncompliance, and thus shutdown, only by undergoing a costly and extensive restructuring.[7]

FIRREA Litigation in the District Courts

A number of thrifts, which like the plaintiffs here had made acquisitions in the early to mid-1980's, sued OTS in the district courts, seeking injunctions against the enforcement of the new statutory and regulatory capital standards against them. In each case, the thrifts advanced similar arguments. The thrifts contended that a savings provision of FIRREA, codified at 12 U.S.C. § 1437(a), prevented abrogation of the Bank Board's "agreements," as expressed in the resolutions, forbearance letters, and the like, regarding the regulatory treatment of goodwill assets generated in those mergers that it had approved. The thrifts argued further that, if FIRREA were construed to abrogate these "agreements," enforcement of these new capital standards would constitute a taking without just compensation

---

[6] Even if Winstar had been able fully to count goodwill as regulatory capital, it may have failed nonetheless to meet the new statutory capital requirements. *See Statesman*, 26 Cl.Ct. at 924.

[7] Despite this restructuring, Glendale fell out of compliance with one of the regulatory capital standards in March of 1992. As of this date, it is still operating and has not been placed in receivership.

in violation of the Fifth Amendment. A number of thrifts obtained short-lived victories in the district courts preventing OTS from enforcing these standards against them. However, without exception these decisions were reversed on appeal. *Guaranty Fin. Servs., Inc. v. Director, Office of Thrift Supervision*, 742 F.Supp. 1159 (M.D.Ga.1990), *rev'd*, 928 F.2d 994 (11th Cir.1991); *Far W. Fed. Bank, S.B. v. Director, Office of Thrift Supervision*, 746 F.Supp. 1042 (D.Or.1990), *rev'd*, 951 F.2d 1093 (9th Cir.1991); *Security Sav. & Loan Ass'n v. Director, Office of Thrift Supervision*, 761 F.Supp. 1277 (S.D.Miss.1991), *rev'd*, 960 F.2d 1318 (5th Cir.1992); *Carteret Sav. Bank, F.A. v. Office of Thrift Supervision*, 762 F.Supp. 1159 (D.N.J.1991), *rev'd*, 963 F.2d 567 (3d Cir.1992).[8]

Following the lead of the Courts of Appeals for the Eleventh Circuit in *Guaranty Fin. Servs., Inc. v. Ryan*, 928 F.2d 994, 996 (11th Cir.1991), and for the Sixth Circuit in *Franklin Fed. Sav. Bank v. Director, Office of Thrift Supervision*, 927 F.2d 1332 (6th Cir.1991), the courts of appeals have unanimously held that FIRREA's "savings provision" does not exempt from its regulatory capital standards the supervisory goodwill created by these alleged "agreements" with the Bank Board. *See Security Sav. & Loan*; *see also Charter Fed. Sav. Bank v. Office of Thrift Supervision*, 976 F.2d 203 (4th Cir.1992); *Carteret Sav.*

[8] In one case, a district court held that these forbearances were contractual obligations of the government, breached by FIRREA, and ordered recision as an appropriate remedy. *Charter Fed. Sav. Bank v. Director, Office of Thrift Supervision*, 773 F.Supp. 809 (W.D.Va.1991), *rev'd*, 976 F.2d 203 (4th Cir.1992).

Bank, F.A. v. Office of Thrift Supervision, 963 F.2d 567 (3d Cir.1992); *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598 (D.C.Cir.1992); *Far W. Fed. Bank, S.B. v. Director, Office of Thrift Supervision*, 951 F.2d 1093 (9th Cir.1991). With respect to the requests for injunctions, the courts of appeals were nearly unanimous in declining to address the merits, holding that a claim for damages under the Tucker Act would be the appropriate remedy, if any, for an asserted takings claim. *Carteret*, 963 F.2d at 581-83, *Franklin Fed.*, 927 F.2d at 1341; *Far W. Fed. Bank*, 951 F.2d at 1100. Cf. *Transohio*, 967 F.2d at 612-13 (finding jurisdiction in the district courts over claims for specific (rather than monetary) relief under contract and takings theories). The two courts of appeals that have addressed a breach of contract-related issue held that the thrifts before them had not contracted with the government for the specific regulatory treatment of previously authorized supervisory goodwill. *Transohio*, 967 F.2d at 618-24; *Charter Fed.*, 976 F.2d at 210-213.

Court of Federal Claims Litigation

As the government was accumulating its victories in the courts of appeals, Winstar, Statesman, Glendale, and a number of other thrifts similarly situated were prosecuting suits in the United States Claims Court, now the Court of Federal Claims. The plaintiffs claim, *inter alia*, that FIRREA's regulatory capital requirements, as implemented by OTS, breached their contracts with the government by repudiating the regulatory treatment of goodwill that they had been promised by the Bank Board.

Winstar's contract claim was the first decided. On cross-motions for summary judgment, the trial court ruled that Winstar had an implied-in-fact contract with the government under which it "would be permitted to continue to treat supervisory goodwill as a capital asset and to amortize it for 35 years, regardless of changes in generally accepted accounting principles (GAAP) or in regulatory policy." *Winstar I*, 21 Cl.Ct. at 115.[9] The court concluded that this contract did not impair the power of Congress to regulate, but Winstar was entitled to damages for the resulting breach of the contract. *Id.* at 116. The court analogized Winstar's claim to a suit for compensation under the Fifth Amendment, in which one accepts the power of Congress to regulate but requests compensation for the exercise of that power. *Id.*

After additional briefing, and on the government's request for clarification, the court issued a second opinion, affirming its previous holding that an implied in fact contract existed giving Winstar a right to treat supervisory goodwill as a capital asset for 35 years and holding that the government breached this right when Congress enacted FIRREA limiting the amortization period to 20 years. *Winstar II*, 25 Cl.Ct. at 549. The court discussed at length and distinguished the Supreme Court's decision in *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41, 106 S.Ct. 2390, 91 L.Ed.2d 35 (1986) (*POSSE*), on the ground it did not involve a contract.

---

[9] The court did not rely upon the Assistance Agreement in reaching this conclusion. Rather, it cited the forbearance letter, as well as several internal Bank Board documents, as evidence of the government's "intent." *Winstar I*, 21 Cl.Ct. at 115.

In *POSSE*, the Court held that Congress could abrogate, as it did, the right a state previously had to withdraw from the Social Security system. *Id.* Finally, the Claims Court concluded that because the regulatory capital reforms of FIRREA were enacted "to take away the plaintiffs' rights to use supervisory goodwill" and not for the public good, the government was not absolved of contract liability under the "Sovereign Acts Doctrine." 25 Cl.Ct. at 551- 53.

Applying its *Winstar* analysis, the trial court also granted summary judgment in favor of Statesman and Glendale in *Statesman Sav. Holding Corp. v. United States*, 26 Cl.Ct. 904 (1992). In these instances, however, the court found express, rather than implied-in-fact contracts. Specifically, the court found that the integration clause of the Statesman Assistance Agreement incorporated contemporaneous Bank Board resolutions into the contract. *Statesman*, 26 Cl.Ct. at 912. Because the Bank Board resolution approving the Statesman merger provided for the use of the purchase method of accounting, "the government and Statesman had an express contract for the use of that accounting method." *Id.* The court similarly found, based upon the contemporaneous documents in the Glendale transaction, that the government had entered into an express contract under which the Bank Board "agreed to forebear from exercising its authority to bring enforcement proceedings against Glendale for failure to meet regulatory capital standards." *Id.* at 913. Finding that "the government possessed no contractually-based right allowing it to abrogate without liability the parties' express contract," the court held the enactment of FIRREA to be a breach of these contracts not within the scope of the Sovereign Acts

Doctrine. *Id.* at 915. The court then consolidated these cases with *Winstar* and certified for interlocutory appeal its decisions holding the government liable on the plaintiffs' breach of contract claims. *Id.* at 924.

II.

The government does not dispute that the Bank Board and FSLIC understood that the purchase method of accounting would be applied to these mergers, that the resulting supervisory goodwill would be booked as regulatory capital, and that amortization over a period longer than 20 years was approved. Nor does it dispute this understanding was memorialized in contemporaneous documents—the resolutions and forbearance letters. Conversely, the thrifts do not dispute that the government allowed them to proceed in accordance with their understanding until enactment of FIRREA. The dispute here concerns not what was agreed to at that time but whether the parties further agreed that there would be no change in accounting and capital requirements.*

The government contends these documents were made in the exercise of the Bank Board's regulatory function and represent a statement of compliance with then-existing statutory and regulatory requirements which requirements, however, were subject to change. The plaintiffs contend and the Claims Court found that these documents were generated by the Bank Board acting in a contractual capacity and that the statements therein regarding the amortization of supervisory goodwill over periods of twenty to forty years constituted an unconditional promise by the

---

* Editor's Note: Amended on Rehearing, see p. [104a].

Bank Board to that time period which was specifically bargained for by the plaintiffs and subsequently breached by Congress.

The syllogism advanced by the plaintiffs and the Claims Court is that the "government" entered a contract and the "government" breached a contract by enacting FIRREA, treating both the legislative and the executive branches as the contracting entity labelled the "government." If we assume the "government" (Bank Board, FSLIC) promised that the plaintiffs could continue the treatment of the "goodwill" created by the merger as regulatory capital, the "government" (Congress) then reneged by enacting FIRREA's capital reforms. *Quod erat demonstrandum.* However, the merger of the Bank Board's purported obligations under these contracts with the exercise of Congress's power to legislate for the general public good is too simplistic. As the Supreme Court has admonished, "[T]he two characters which the government possesses as a contractor and as a sovereign cannot be thus fused." *Horowitz v. United States*, 267 U.S. 458, 461, 45 S.Ct. 344, 344, 69 L.Ed. 736 (1925) (quoting *Jones & Brown's Case*, 1 Ct.Cl. 383, 384, 1865 WL 1976 (1865)). Congress frequently enacts legislation affecting the performance of contracts (both private and governmental), creating additional benefits to and/or burdens upon the contracting parties. In the case of private parties, the burden of such a change in the law (or the benefit) is usually borne (or enjoyed) by the party on which it falls, unless responsibility is otherwise assigned in the contract.[10] Similarly, when the United States is sued

---

[10] *See Northern Indiana Public Serv. Co. v. Carbon County Coal Co.*, 799 F.2d 265, 278 (7th Cir.1986); *Connick v. Teachers*

as a contractor, the "Sovereign Acts Doctrine" absolves it of liability "for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign." *Horowitz*, 267 U.S. at 461, 45 S.Ct. at 344 (Railroad Administration embargo on shipments of silk); see also *Atlas Corp. v. United States*, 895 F.2d 745, 754-55 (Fed.Cir.), *cert. denied*, 498 U.S. 811, 111 S.Ct. 46, 112 L.Ed.2d 22 (1990) (the Urarium Mill Tailings Radiation Control Act); *Tony Downs Foods Co. v. United States*, 209 Ct.Cl. 31, 530 F.2d 367 (1976) (Executive Order lifting price freeze); *J.B. McCrary Co. v. United States*, 114 Ct.Cl. 12, 84 F.Supp. 368 (1949) (Executive Order freezing labor wages); *Gothwaite v. United States*, 102 Ct.Cl. 400, 1944 WL 3658 (1944) (regulations of War Production Board).

Unlike the doctrine of sovereign immunity, the Sovereign Acts Doctrine does not confer a privilege upon the government that would not be enjoyed by private parties. To the contrary, it ensures that parties contracting with the government will not have rights against the government that the same contract would not afford against a private party. As the Supreme Court explained:

> In this court the United States appear simply as contractors; and they are to be held liable only

---

Ins. & Annuity Ass'n, 784 F.2d 1018, 1022 (9th Cir.), *cert. denied*, 479 U.S. 822, 107 S.Ct. 91, 93 L.Ed.2d 43 (1986); *Haby v. Stanolind Oil & Gas Co.*, 228 F.2d 298, 306 (5th Cir.1955); *Sabine Corp. v. ONG W., Inc.*, 725 F.Supp. 1157, 1177 (W.D.Okla.1989); *Hanover Petroleum Corp. v. Tenneco Inc.*, 521 So.2d 1234, 1240 (La.App. 3d Cir.), *cert. denied*, 526 So.2d 800 (La.1988); *Sheldon-Seatz, Inc. v. Coles*, 319 Mich. 401, 29 N.W.2d 832, 835 (1947).

> within the same limits that any other defendant would be in any other court. Though their sovereign acts performed for the general good may work injury to some private contractors, such parties gain nothing by having the United States as their defendants.

Horowitz, 267 U.S. at 461, 45 S.Ct. at 344 (quoting *Jones*, 1 Ct.Cl. at 384).

A private party does not necessarily promise that Congress will act only for the benefit of his promisee's interests under the contract. He is liable for detrimental actions only to the extent provided for in the contract. Likewise, the sovereign acts of the government are not automatically swept within the scope of performance to which it is bound by the promises of its contracting agents. Warranties as to the state of the law are not implied between private parties. Nor may such warranties be implied against the government when it acts in its contracting role. As in the case of private parties, the government bears responsibility for FIRREA's change in regulatory capital standards only to the extent that the plaintiffs, the Bank Board, and FSLIC have provided in their contracts.

On the other hand, every act of Congress does not *ipso facto* fall within the Sovereign Acts Doctrine. The United States cannot repudiate its contractual obligations with impunity merely by acting through Congress. *See Perry v. United States*, 294 U.S. 330, 55 S.Ct. 432, 79 L.Ed. 912 (1935) (invalidating legislation authorizing the redemption of United States Liberty Bonds in currency other than gold); *Lynch v. United States*, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434 (1934) (invalidating legislation repudiating the

government's obligation to pay war risk insurance benefits to veterans).

The Claims Court found that the purpose of FIRREA "was to take away *plaintiffs' rights* to use supervisory goodwill," *Winstar II*, 25 Cl.Ct. at 552 (emphasis added). We cannot agree. Rather we conclude that FIRREA's capital reforms are "general and public" acts which the Sovereign Acts Doctrine applies. Congress found that "[t]o a considerable extent, the size of the thrift crisis resulted from the utilization of capital gimmicks that masked the inadequate capitalization of thrifts." *House Report* at 310, 1989 U.S.C.C.A.N. at 106. In addition to banning future gimmickry, Congress chose to "unmask" that which had been practiced in the past. As Congressman Schumer noted in his Additional Views to the Committee Report:

> Not counting goodwill would cause some thrifts that appear to have adequate capital with goodwill counted not to be in compliance with the standards. These thrifts argue that by not including goodwill in capital, the government would be taking healthy thrifts and making them unhealthy. But whether a thrift is financially healthy does not depend on how capital is defined. Clearly, lowering the capital standards so that all thrifts no matter how weak are in compliance would not magically make all weak thrifts strong. Similarly, allowing undercapitalized thrifts to count gimmicks as capital does not make them any better capitalized nor any less of a threat to the taxpayers.

1989 U.S.C.C.A.N. at 408. The touchstone of the cases recognizing a sovereign act is that the congressional

action had general applicability for the public good. That is the case here. Plaintiffs were not singled out as targets.[11] The accounting methods which had been approved were disapproved for all of the industry because of the perceived harm to the public. Nor, we might add, did all thrifts which had taken over failing thrifts fail as a result of this general legislation.

In any event, concluding as we do that the FIRREA legislation falls within the Sovereign Acts Doctrine does not end the inquiry here. As indicated, where a change in the law affects performance under a contract between private parties, a court must review the contract to determine which party bore the risk of such change. Thus, we must make a similar analysis of the subject agreements, the matter to which we now turn.

---

[11] The following two cases cited by the dissent which addressed an agency defense to a clear breach of contract (not congressional action) on the ground that it falls within the Sovereign Acts Doctrine are inapt. As indicated, the Sovereign Acts Doctrine may not be invoked where only particular contracts are the targets of legislation repudiating a government obligation to a specific party. The same would be true of agency action. *See Everett Plywood Corp. v. United States*, 227 Ct.Cl. 415, 651 F.2d 723, 732 (1981) (Agency's termination of single logging contract for environmental reasons not sovereign act. "[It] would have been an entirely different case if Congress had passed a law immediately prohibiting all cutting in all public forests"); *Sun Oil Co. v. United States*, 215 Ct.Cl. 716, 572 F.2d 786, 817 (1978) (Secretary of Interior's actions were not "actions of public and general applicability, but were actions directed principally and primarily at plaintiff's contractual right to install a [particular oil] platform.").

III.

Contract interpretation presents a question of law that we review *de novo*. *Reliance Ins. Co. v. United States*, 931 F.2d 863, 865 (Fed.Cir.1991). The government contends that the contracts between the plaintiffs, FSLIC, and the Bank Board cannot be construed so as to obligate the Bank Board to measure regulatory capital in a manner inconsistent with what Congress later required in FIRREA. We agree.

In concluding that contracts similar to those present in this case did not obligate the Bank Board to regulate contrary to FIRREA, the Court of Appeals for the District of Columbia Circuit applied "the rule of construction laid down by the Supreme Court, that one who wishes to obtain a contractual right against the sovereign that is immune from the effect of future changes in law must make sure that the contract confers such a right in unmistakable terms." *Transohio*, 967 F.2d at 618 (quoting *Western Fuels-Utah, Inc. v. Lujan*, 895 F.2d 780, 789 (D.C.Cir.), *cert. denied*, 498 U.S. 811, 111 S.Ct. 47, 112 L.Ed.2d 24 (1990)). *Accord Charter Fed.*, 976 F.2d at 212 (applying rule to Bank Board resolutions); *Guaranty Fin. Servs.*, 928 F.2d at 998-1000 (applying rule to Bank Board forbearance letter referenced in Capital Maintenance Agreement between the thrift and FSLIC). This "unmistakeability" doctrine is derived primarily from the decision of the Supreme Court in *POSSE*, *supra*, in which certain State and public agencies argued they had contract rights (arising from so-called "Section 418 Agreements" with the Secretary of Health and Human Services) to withdraw from the Social Security System that were breached by Congress's enactment of section 103 of

the Social Security Amendments Act of 1983, Pub.L. No. 98-21, 97 Stat. 71 (codified at 42 U.S.C. § 418(g) (1988)). 477 U.S. at 50, 106 S.Ct. at 2395. In rejecting this contention, the Court noted that "sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." *POSSE*, 477 U.S. at 52, 106 S.Ct. at 2396 (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148, 102 S.Ct. 894, 907, 71 L.Ed.2d 21 (1982)). Construing the Section 418 Agreements "to avoid foreclosing exercise of sovereign authority," *POSSE*, 477 U.S. at 53, 106 S.Ct. at 2397, the Court concluded these Agreements were subject to Congress's power to alter the Social Security law. *Id.* at 54, 106 S.Ct. at 2397.

The plaintiffs posit that this rule of construction is applicable only where Congress has expressly reserved its power to amend a statute, *see Sinking-Fund Cases*, 99 U.S. (9 Otto) 700, 720-21, 25 L.Ed. 496 and 504 (1879), or where the subject contract expressly incorporates a statute that is subject to amendment. *See POSSE*, 477 U.S. at 53-54, 106 S.Ct. at 2397. The first proposition is ludicrous. An express reservation of the power to amend, be it in the Banking Code, the Internal Revenue Code, the Lanham Act or any other congressional enactment, is not a prerequisite to the exercise of that power. Congress may amend statutes as part of its constitutional authority to legislate. This authority is ubiquitous even if not expressly acknowledged or reserved. *See Education Assistance Corp. v. Cavazos*, 902 F.2d 617, 629 (8th Cir.), cert. denied, 498 U.S. 896, 111 S.Ct. 246, 112 L.Ed.2d 205 (1990) (citing *POSSE* and recognizing Congress' power to amend a

statute). The plaintiffs were on notice that Congress had altered in the past and could alter in the future the statutory/regulatory burdens to which they were subject. *California Hous. Sec.*, 959 F.2d at 959. Nor was it incumbent upon the parties to expressly acknowledge that their performance, whether contractual or otherwise, must conform to applicable law.

For a regulatory agency like the Bank Board to abdicate by contract its duty to regulate in accordance with subsequent acts of Congress requires, at the very least, an unmistakable statement of its intent to do so. But we question whether even this would suffice. The Court has stated that the government's power as a sovereign "cannot be contracted away." *North Am. Commercial Co. v. United States*, 171 U.S. 110, 137, 18 S.Ct. 817, 828, 43 L.Ed. 98 (1898). More recently, it has noted, in the context of the Contract Clause, that a State need not "adhere to a contract that surrenders an essential attribute of its sovereignty." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 23, 97 S.Ct. 1505, 1518, 52 L.Ed.2d 92 (1977). As Justice Brennan stated in dissent:

> One of the fundamental premises of our popular democracy is that each generation of representatives can and will remain responsive to the needs and desires of those whom they represent .... The Framers fully recognized that nothing would so jeopardize the legitimacy of a system of government that relies upon the ebbs and flows of politics to "clean out the rascals" than the possibility that those same rascals might perpetuate their policies simply by locking them into binding contracts.

United States Trust, 431 U.S. at 45, 97 S.Ct. at 1529; *see also Transohio*, 967 F.2d at 620-24. To this we add our own observation that because private parties cannot hope to curtail by contract the sovereign acts of Congress, *Horowitz* and its progeny would suggest that the government's agents of the executive branch, acting by way of contracting authority, cannot do so either.

We need not decide here, however, whether an agency's putative waiver of sovereign authority would ever be enforceable. None of the contracts in this appeal contain language that, under the strict rule of construction in *POSSE*, would obligate the Bank Board to regulate in a manner inconsistent with subsequent acts of Congress. The plaintiffs assert and the Claims Court found such an obligation in the forbearance letters and Bank Board resolutions *supra*, in which the government recognized that intangible assets could be counted as regulatory capital. At most, these statements acknowledge the permissibility at that time of that accounting procedure. They do not commit the Bank Board to a future course of performance under an immutable regulatory standard. The thrifts point to the approved amortization periods for supervisory goodwill of several decades as precluding a change. However, the length of the amortization periods of these intangible assets simply reflects compliance with the Bank Board's then-existing regulations and accounting standards.[12] The Bank Board's acknowledgment that these time

---

[12] For example, the Bank Board's *Statement of Financial Accounting Standards No. 72* provided that goodwill be amortized over a period *no greater than* the estimated remaining life of the long-term, interest- bearing assets.

periods were acceptable *at the time of the mergers* is not an acknowledgement that the law or even regulations would allow treatment of supervisory goodwill as regulatory capital throughout the entire amortization periods. *See Charter Fed.*, 976 F.2d at 211 ("The resolutions issued by the [Bank Board] in connection with the mergers merely granted the agency's approval of the merger and the accounting practices employed by Charter in connection therewith.") No *promise* was made committing the Bank Board to maintenance of the same capital treatment over the various amortization periods. *See Transohio*, 967 F.2d at 619 (passive language in forbearance letters too ambiguous to satisfy the *POSSE* rule).

To the contrary, we conclude that the plaintiffs assumed the risk that the law would change. The Supervisory Assistance Agreement with Glendale acknowledges that "[n]othing in this Agreement shall require any unlawful action or inaction by either of the parties hereto." Similarly, both the Winstar and the Statesman Assistance Agreements provide that "[n]othing in this Agreement shall require any unlawful action or inaction by either party." The thrifts contend and the Claims Court found that the "unlawful action" clauses must be read to require compliance only with *then-existing* law, otherwise the government would be free to modify the Agreements by statute, counter to the provision of these Agreements requiring that modifications be executed in writing by the parties. *Statesman*, 26 Cl.Ct. at 914. This improperly mixes the sovereign and contracting functions of the government. FIRREA was not a modification of their contracts. It was a sovereign act of Congress that modified the regulatory environ-

ment in which the thrifts and OTS (the Bank Board's successor) would act. Furthermore, to limit these unqualified "unlawful action" clauses to then-existing laws and regulations would violate the rule of *POSSE* that waivers of sovereign authority must, at least, be explicit. The plaintiffs, the Bank Board and FSLIC all agreed to act in accordance with the law. They did not limit this obligation to those laws in effect at that time or laws that made their contract less burdensome or more profitable.

In addition, the "Accounting Principles" clauses in the Assistance Agreements of Statesman and Glendale, while not specifically addressing the issue here, show a recognition by the contracting parties that "the governing regulations and the accounting principles" would be subject to clarification, interpretation, or *amendment* by the Bank Board or its successor (here, OTS).[13] There is no restriction on

---

[13] As an example, the "Accounting Clause" in the Assistance Agreement of Statesman reads:

> [A]ny computations made for the purposes of this Agreement shall be governed by generally accepted accounting principles as applied on a going concern basis in the savings and loan industry, except that where such principles conflict with the terms of this Agreement, applicable regulations of the Bank Board or [FSLIC], or any resolution or action of the Bank Board approving or adopted concurrently with this Agreement, then this Agreement, such regulations, or such resolution or action shall govern. In the case of any ambiguity in the interpretation or construction of any provision of this Agreement, such ambiguity shall be resolved in a manner consistent with such regulations and the Bank Board's resolution or action. If there is a conflict between such regulations and the Bank Board's resolution or action, the Bank Board's resolution or action shall govern. For the

what regulations were subject to amendment. In any event, the regulations here involved are essentially irrelevant to this case. The plaintiffs' quarrel is with the new statute, FIRREA, which did away with accounting gimmicks and extended amortization periods. The regulations merely conform to the statute.*

Recognizing the difficult, if not insurmountable, burden of showing that their contracts obligated the Bank Board to adhere to the regulations in effect at the time of the mergers notwithstanding subsequent acts of Congress, the plaintiffs argue that, while the capital requirements could be changed by Congress, their contract claims remain viable. Per the plaintiffs, it is irrelevant that their contracts do not restrict the Bank Board's duty to regulate in accordance with subsequent acts of Congress since they seek money damages for breach not specific performance.

---

purposes of this section, the governing regulations and the accounting principles shall be those in effect on the Effective Date *or as subsequently clarified, interpreted, or amended by the Bank Board or the Financial Accounting Standards Board* ("FASB"), respectively, or any successor organization. [Emphasis added.]

By lifting the third sentence out of context, the dissent finds an express agreement that the negotiated forbearance and accounting procedures were guaranteed to continue despite a change in the law. It is not surprising that no party makes the argument that the right asserted by Statesman and Glendale to use purchase method accounting and extended amortization time periods involve an "ambiguity . . . in this [Assistance] Agreement." It does not. Moreover, the change was the enactment of a new statute not a mere administrative change in a regulation.

* Editor's Note: Amended on Rehearing, see p. 104a.

This distinction in remedies, though significant to the law of takings, is not relevant to the plaintiffs' claims for breach of contract. A breach requires a binding promise. 11 Samuel Williston, *A Treatise on the Law of Contracts* § 1290 (3d ed. 1968). Specific performance and damages are merely alternative remedies for breach, for which damages is the primary remedy. *Id.* at § 1338. Where no contractual duty exists, no breach of contract is possible and no judgment for damages can be obtained. 5 Arthur Linton Corbin, *Corbin on Contracts* § 993 (1964). Because these contracts did not obligate the Bank Board (or OTS) to regulate in a manner inconsistent with FIRREA, the change in treatment of goodwill does not violate a contractual duty and cannot support a claim for damages for breach.

IV.

The appellants and amici[14] raise numerous overlapping and intertwining arguments, all of which have been considered although not specifically discussed. Several merit at least comment. The "illusory" contract argument is one. The Claims Court concluded that construing these contracts to permit the Bank Board (or OTS) to regulate as

---

[14] The Chamber of Commerce of the United States, The Aerospace Industries Association of America, The Electronic Industries Association, The Shipbuilders Council of America, Inc., Litton Industries, Inc., Amwest Savings Association, The Adam Corporation/Group, The Globe Savings Bank (FSB), Phoenix Capital Group, Inc., Old Stone Bank (FSB), Old Stone Corporation, Franklin Federal Bancorp, The Long Island Savings Bank (FSB), The Long Island Savings Bank of Centereach (FSB), Keystone Holdings, Inc., and American Savings Bank (FA).

subsequently mandated by FIRREA would render the contracts "illusory" because the Bank Board "would in effect be agreeing to abide by its promises only so long as it unilaterally decided to keep those promises." *Statesman*, 26 Cl.Ct. at 914-15. The court suggested that a contract which permits the "government" to perform at its "unrestricted pleasure" is really not a contract at all. *Id.* (quoting 17 C.J.S. *Contracts* § 98 (1963)).

As previously indicated, these contracts are no more "illusory" than a contract between private parties whose profitability is affected or determined by subsequent legislative action. A promisee whose contract was rendered unprofitable by FIRREA cannot hold his promisor accountable, unless the contract assigned the burden of such legislation to the latter. *See* note 10, *supra*. Contractors that desire to immunize their bargains from the vagaries and uncertainties of future legislation have developed a variety of devices for doing so. A *force majeure* clause is one such device. *Northern Ind.*, 799 F.2d at 274-75. Price floors and price ceilings are another. *Id.* at 278. Indemnity provisions are yet another. Similarly, a contractor may expressly fix its performance to correspond to then-existing regulations. *Hills Materials Co. v. Rice*, 982 F.2d 514 (Fed.Cir.1992). But a contract that lacks any of these (or similar) devices and thus leaves a private party vulnerable to changes in the law that render its performance unprofitable is not "illusory." It is merely unprofitable.

For the reasons discussed in section II *supra*, contracts between a private party and a contracting agent of the government are no different. We have concluded that under the *POSSE* rule of construc-

tion, the Bank Board, in all of these contracts, did not bind the "government" generally or itself particularly to regulate plaintiffs only in accordance with past legislation. Merely by signing these contracts, the Bank Board did not assume responsibility for the effects of subsequent legislation. The plaintiffs could have obtained an enforceable promise shifting the risk to the government. But they did not do so. *See, e.g., Amino Bros. Co. v. United States*, 178 Ct.Cl. 515, 372 F.2d 485, 491, *cert. denied*, 389 U.S. 846, 88 S.Ct. 98, 19 L.Ed.2d 112 (1967) ("The Government cannot make a binding contract that it will not exercise a sovereign power, but it can agree in a contract that if it does so, it will pay the other contracting party the amount by which its costs are increased by the sovereign act."); *Piggly Wiggly Corp. v. United States*, 112 Ct.Cl. 391, 81 F.Supp. 819, 823 (1949) (sovereign acts may harm party that has contracted with government unless contracting party protected against price in the event of the act). Although others appear to have dealt with the risks of future changes in the law in their contracts, plaintiffs here did not. Brief for Amici Curiae Keystone Holdings, Inc. and American Savings Bank, F.A. at 12. There is no *force majeure* clause in any of the plaintiffs' contracts. There is no clause that limits the plaintiffs' future capital contribution (for purposes of meeting regulatory capital standards) to a fixed sum. There is simply no clause that obligates FSLIC to indemnify any of the plaintiffs against future regulatory changes in the capital standards.[15]

---

[15] In the Winstar Assistance Agreements and in the Glendale Supervisory Action Agreement, the government did promise to indemnify the thrifts against undisclosed liabilities and litigation challenging the merger. The Glendale contract also

Because nothing in these contracts shifts that risk to the Bank Board, that risk must be borne by the plaintiffs.

V

We conclude that the plaintiffs had no contract right to have the goodwill generated by their acquisition(s) treated as regulatory capital. All of the subject contracts left the Bank Board (and OTS) free to regulate in accordance with subsequent acts of Congress, specifically FIRREA. Thus, there was no contractual promise by the government which could be breached. Because none of the contracts assigned to FSLIC or the Bank Board the risk of any subsequent change in capital standards by Congress, the plaintiffs bear that burden here. We, therefore, reverse the Claims Court's judgment of liability in each of these consolidated cases.

Our disposition of these appeals does not dispose of all claims for recovery asserted by the plaintiffs. In particular, plaintiffs have asserted constitutional claims for just compensation for the taking of their property. To the extent a plaintiff's other claims are not premised upon the taking of a *contract right* to continue to use goodwill as regulatory capital, such claims remain for decision. Accordingly, their cases are remanded for further proceedings consistent herewith.

VI

Each party will bear its own costs.

REVERSED AND REMANDED.

---

states which party would bear the risk of change in interest rates. These indemnification obligations are not involved here.

PAULINE NEWMAN, Circuit Judge, dissenting.

There has been a good deal of litigation engendered by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), including litigation arising out of arrangements similar to those of the three cases here consolidated, wherein solvent banks and other investors were encouraged by the government to enter into merger arrangements for the purpose of salvaging failing or failed thrift institutions. Such salvage operations included the infusion of substantial sums of private as well as governmental money. The solvent banks contributed their resources on the promise by the government that the capital requirements of the merged banks could be met, *inter alia*, by capitalization of "supervisory goodwill" and the long-term amortization of the capital account. These promises were memorialized in lengthy contracts that set forth the details and integrated the arrangements, including the implementing forbearance letters and Bank Board resolutions. These documents were explicit as to the financial and other obligations of all parties, the conditions and mutual promises by which these commitments involving many millions of dollars were made. It is not disputed that these arrangements would not have been entered into but for the conditions that were agreed to by the government, after extensive negotiation. These conditions, which enabled these arrangements, were made illegal by FIRREA or by the regulations implementing FIRREA.

In the three cases at bar the merger agreements were made in 1981, 1984, and 1988. After enactment of FIRREA in 1989 the government required these merged thrift institutions to conform with the new

accounting standards and capital requirements. In two of the three cases these changed requirements immediately placed the merged banks into non-compliance, and these institutions were promptly placed in receivership.

The panel majority, in a lengthy analysis, determines that these banks are not entitled to specific performance of their preexisting arrangements. That question, although stressed in the government's briefs, is not at issue in this case. That question was extensively litigated in the regional district and circuit courts, in connection with various other banks' requests for relief in the form of specific performance of the particular arrangements between such banks and the relevant government agency. However, that remedy is not within the Court of Federal Claims' Tucker Act authority, and the issue of specific performance is not before the Federal Circuit. Nor are any contracts other than those of these three sets of plaintiffs.

Although litigation has been extensive, the regional circuits did not reach the question of the financial consequences of the enactment of FIRREA and of the resultant impossibility of performance of the various arrangements. The regional circuits uniformly held that these questions of money damages are excluded from their purview. The issues and remedies of financial recompense are decided for the first time in these suits in the Court of Federal Claims.

In these three appeals the plaintiff banks do not dispute that Congress has the power to enact FIRREA and to foreclose continued performance of these contracts. The issue, as the Court of Federal Claims made clear, is whether the government is

liable for the financial consequences of these acts, not whether the government had the authority to act.

The panel majority, rejecting the reasoning and conclusions of the Court of Federal Claims, holds that there is no governmental liability because there were no contracts between the government and these thrift institutions. The panel majority also holds that if there were contracts, the entire risk of impossibility of performance must be borne by the nongovernmental party. The rationale for this latter ruling appears to be that the government may abrogate contracts without liability, under the "sovereign acts doctrine".

Since there are indeed contracts as to all three of these thrift groups, and immunity under the sovereign acts doctrine is not warranted in these cases, the Court of Federal Claims correctly decided that the government is liable for the financial consequences of its acts. Indeed, governmental responsibility is not a new idea in this nation's law, and the reasoning of the Court of Federal Claims is solidly supported in contract law and in the application of the sovereign acts doctrine to this case.

A

The sovereign acts doctrine appeared in Court of Claims jurisprudence early in that court's existence, in *Deming v. United States*, 1 Ct.Cl. 190, 1865 WL 2004 (1865). It relates to acts of government in exercise of the responsibility to make and administer laws for the general welfare. As a "doctrine" it is an apothegm for the principle that there is a distinction between governmental acts for general and public benefit, and acts of government when dealing with specific persons and businesses. When the govern-

ment acts as a contractor with a specific private entity, this doctrine provides no immunity:

> The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.

Sinking-Fund Cases, 99 U.S. (9 Otto) 700, 719, 25 L.Ed. 496 and 504 (1879). However, when the government acts as legislator/regulator in furtherance of the general welfare, an incidental and unintended impact on specific preexisting contracts to which the government is a party does not thereby increase the responsibility or liability of the government as contractor. As the Supreme Court explained, public and general acts of government that are not directed to particular contracts do not impose liability upon the government beyond that which it has as a party to the contract:

> It has long been held by the Court of Claims that the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign .... "The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other. Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it has entered with private persons."

Horowitz v. United States, 267 U.S. 458, 461, 45 S.Ct. 344, 344-45, 69 L.Ed. 736 (1925) (quoting *Jones v. United States*, 1 Ct.Cl. 383, 384-85, 1865 WL 1976 (1865)). Illustrations are seen, *e.g.*, in *Amino Bros. Co. v. United States*, 178 Ct.Cl. 515, 372 F.2d 485, 491, *cert. denied*, 389 U.S. 846, 88 S.Ct. 98, 19 L.Ed.2d 112 (1967) (action by the Army Corps of Engineers in flood control on the Smoky Hill River held a sovereign act for public benefit; there was no express or implied promise to contractor working downriver that the flood control power would not be exercised); *Piggly Wiggly Corp. v. United States*, 112 Ct.Cl. 391, 419-433, 81 F.Supp. 819, 823 (1949) (price control and allocation of plywood by the Office of Price Administration was a sovereign act; it was proper for Quartermaster Corps of War Department to terminate contract for convenience with appropriate recompense to contractor.)

It is quite clear that the sovereign acts doctrine does not mean that the government can walk away from any contract to which it is a party, avoiding all contractual liability, whenever there is intervening legislative or regulatory action. The sovereign acts doctrine "is not a boundless justification for governmental non-liability." Peter S. Latham, *The Sovereign Act Doctrine in the Law of Government Contracts: A Critique and Analysis*, 7 U.Tol.L.Rev. 29, 41 (1975). In *Perry v. United States*, 294 U.S. 330, 55 S.Ct. 432, 79 L.Ed. 912 (1935) the Supreme Court considered the application of the sovereign acts doctrine to a congressional resolution that declared that payment in gold was "against public policy" and

that all past and future governmental obligations would be paid with then legal tender. The Court held that persons holding Treasury bonds that provided for payment in gold coin had a binding and enforceable contract, and that:

> Congress can [not] disregard the obligations of the Government at its discretion . . . . We do not so read the Constitution.

Perry, 294 U.S. at 350, 55 S.Ct. at 434. In *Freedman v. United States*, 162 Ct.Cl. 390, 320 F.2d 359 (1963) the Court of Claims explained that the sovereign acts doctrine

> does not relieve the government from liability where it has specifically undertaken to perform the very act from which it later seeks to be excused.

Id. at 402, 320 F.2d 359. According to these precepts, acts of government that directly abrogate existing contractual obligations, even if undertaken for reasons of general welfare, are not immune from liability. *E.g.*, *Everett Plywood Corp. v. United States*, 227 Ct.Cl. 415, 651 F.2d 723, 731-32 (1981) (cancellation of timber contract due to government's concern for environment is not immune from liability as a sovereign act); *Sun Oil Co. v. United States*, 215 Ct.Cl. 716, 572 F.2d 786, 817 (1978) (government's denial of drilling permit and consequent breach of drilling lease due to government's environmental concerns is not immune as a sovereign act).

Applying precedent, the Court of Federal Claims held that the abrogation of the arrangements the government had entered into with these banks was not immune from liability as a sovereign act. As

further discussed, no error in this analysis or conclusion has been shown.

B

It can not be seriously disputed that in its arrangements with these banks the government acted as a contractor. These were commercial arrangements, entered into after extensive arms-length negotiations and upon mutual exchanges of consideration. They are embodied in lengthy documents, with all requisite governmental approvals, signed by authorized persons, and including the specific accounting and amortization terms that were essential conditions. Pertinent documents were integrated and cross-referenced, in textbook compliance with the rules of contract. There is no asserted ambiguity.[1] Indeed, it will come as a surprise to the many lawyers involved in these multi-million dollar transactions that they did not, after all, succeed in making a contract. The government's disavowal of having made binding contracts comes with poor grace, not only in view of the government's encouragement of these arrangements when they were made, but also because performance was accepted by the government for several years.

The Court of Federal Claims, considering the question of the relationship of these arrangements to the enactment and administration of FIRREA, found that the various banks that had merged with failed or failing thrifts, and the terms of the mergers whereby the existing capital requirements were met, were well known to the legislators. Recognition of these

---

[1] The panel majority appears to misapprehend my position, for there is no issue of ambiguity.

arrangements pervades the legislative record. *E.g.*, H.R.Rep. No. 54, 101st Cong., 1st Sess., pt. 1, at 498 (1989), *reprinted in* 1989 U.S.C.C.A.N. 86, 293-94 (additional views of Mr. Annunzio, Mr. Kanjorski and Mr. Flake):

> Simply put, [FIRREA] has reneged on the agreements that the government entered into concerning supervisory goodwill . . . . Clearly, the agreements concerning the treatment of goodwill were part of what the institutions had bargained for. Just as clearly, [FIRREA] is abrogating those agreements.

H.R.Rep. No. 54, 101st Cong., 1st Sess., pt. 5, at 27-28 (1989), *reprinted in* 1989 U.S.C.C.A.N. 397, 410-11 (additional views of Mr. Hyde):

> Overnight, as the accounting standards are re-legislated, [institutions with supervisory goodwill agreements] will become 'unsafe and unsound' for purposes of federal banking law . . . . [T]he current terms of [FIRREA] could end up punishing the very institutions that came to the aid of taxpayers in the early part of this decade . . . . I believe that many of these institutions have a case based in law, in equity, and in fundamental fairness.

135 Cong.Rec. H2706 (daily ed. June 15, 1989) (Statement of Rep. Crane):

> In the early 1980's a number of savings and loans were asked by our government to acquire ailing thrifts in order to help the government and the taxpayers avert paying billions of dollars in bailout funds . . . . How many institutions will

> trust the government after seeing Congress abrogate these deals?

135 Cong.Rec. H2783 (daily ed. June 15, 1989) (Statement of Rep. Ackerman):

> In its present form, [FIRREA] would abrogate written agreements made by the U.S. government to thrifts that acquired failing institutions by changing the rules in the middle of the game . . . .

Criticisms such as the following reinforce the view that these contracts were targeted, and not an incidental side-effect of a general and public law. 135 Cong.Rec. H2705 (daily ed. June 15, 1989) (statement of Rep. Gonzalez):

> In blunt terms, the bank Board and FSLIC Insurance fund managers entered into bad deals—I might even call them steals.

Recognizing that it was abrogating these agreements, Congress sought advice on the consequences of enactment of FIRREA; the record shows that it received inconsistent advice. *Compare* Letter from the Comptroller General of the United States to the Senate Committee on Banking, Housing and Urban Affairs (August 27, 1990), advising that there could be liability for breach of contract and unconstitutional taking of property, *with* the statement of Rep. Gonzalez, at 135 Cong.Rec. H2705 (daily ed. June 15, 1989) that the Department of Justice advised that FIRREA would result in no contractual or constitutional claims. This record is pertinent today because it shows that Congress knew of these arrangements, and knew that their performance would be affected by the new requirements set by FIRREA.

There is no error in the ruling of the Court of Federal Claims that the effect on these banks was a foreseen and intended consequence of the legislation and its regulatory implementation, thus negating immunity as a sovereign act.

It is an unwarranted criticism of the Court of Federal Claims to state that it improperly mixed the sovereign and contracting functions of government, for it is clear that the Court understood and correctly applied the distinction. The sovereign act doctrine does not mean that the legislative branch is somehow a different "government" than the executive branch, and that the United States is not liable for contract-affecting actions of the executive in administering legislation. To the contrary, the protection of persons who contract with the government through its agencies is essential to the nation's operations. The Court of Federal Claims correctly concluded that the government could not, without liability, abrogate the specific contracts that the government had made with thrift institutions. The court stressed that the issue under the Tucker Act is solely of financial liability.

The government, and the panel majority, rely heavily on *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 106 S.Ct. 2390, 91 L.Ed.2d 35 (1986) ("*POSSE*") wherein the Court held that Congress could remove the right of state government to withdraw from the Social Security system. However, *POSSE* did not hold that Congress could simply abrogate any contract right. In *POSSE* the Court held that there was no bargained-for consideration, and therefore no contract right to start with. 477 U.S. at 55-56, 106 S.Ct. at 2398. The Court stressed that the provision of

Social Security benefits to state employees was a gratuitous benefit bestowed upon the states by Congress. Although the government here presses a far broader interpretation, *POSSE* does not hold that Congress may without liability abrogate contracts between the United States and others except for situations where the government made an "unmistakable" promise not to do so.

The Court of Federal Claims did not make the mistake of confusing the government's right to legislate in the public interest with the government's obligations in specific contractual commitments. This distinction is a necessary implementation of the principles by which our government does business with its citizens. These principles are fundamental to our history. In *Murray v. Charleston*, 96 U.S. (6 Otto) 432, 24 L.Ed. 760 (1878) the Court rejected the theory, offered then as it is now, that a contractual promise can be abrogated through the exercise of inherent sovereign authority. In *Perry v. United States*, discussed *supra*, the Court quoted Alexander Hamilton as follows:

> [W]hen a government enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as an individual. Its promises may be justly considered as excepted out of its power to legislate unless in aid of them. It is in theory impossible to reconcile the idea of a promise which obliges, with the power to make a law which can vary the effect of it.

294 U.S. at 351 n. 2, 55 S.Ct. at 435 n. 2 (citing 3 Hamilton's Works, 518, 519). As the Court in *Perry* reaffirmed, although the government can not agree not to exercise its sovereign power in the future, "the right to make binding obligations is a competence attaching to sovereignty." 294 U.S. at 353, 55 S.Ct. at 436.

C.

The contracts here at issue were entered into after extensive negotiation, with concessions and commitments by both sides. The contracts in the three suits differ in their terms, for each is specific to the circumstances of the acquired and acquiring banks.

The Court of Federal Claims correctly held that these elaborate, lengthy, detailed contemporaneous documents, including documents incorporated by reference, are contracts. Both the government and the banks so treated them during the years of performance in accordance with their terms. Both the government and the banks transferred many millions of dollars on the basis of these arrangements. On the "mere signing", as the panel majority puts it, Winstar and United Federal together contributed two million dollars and assumed additional millions in liabilities; Statesman Savings and American Life and Casualty together contributed twenty-one million dollars and assumed additional millions in liabilities; and Glendale Federal assumed $734 million in liabilities. All of these commitments were conditioned on the specific accounting procedures and amortization requirements that were negotiated and agreed to in order to enable these thrifts to survive while new funds and new management sought to resuscitate them. Further, the government does not

dispute that it has retained the funds contributed by the private banks.

I will not repeat the careful analysis by the Court of Federal Claims of these three sets of documents. I take note of the panel majority's apparent belief that documents incorporated by reference, or conditions subsequent, or integration clauses, do not a contract make. Indeed, it is curious to see the panel majority treat as meaningless the negotiated amortization periods on the reasoning that these periods "complied with the Bank Board's then-existing regulations." These amortization terms were essential to the viability of each bank's investment. That they were not illegal when adopted is not surprising. To hold that their legality when adopted means that they "do not commit the Bank Board", despite their explicit incorporation in contract documents with and by the Bank Board, is a strange view of contract law.

The government argues that the banks simply gambled that the law governing these mergers would not change, and thus are not entitled to redress when the law did change. The contracts show that the parties indeed recognized this possibility, and provided for it in various ways. Thus the "Accounting Principles" clauses in the Winstar and the Statesman agreements reflect the parties' recognition that the accounting principles might in the future be "subject to clarification, interpretation or amendment", and provide that "[i]f there is a conflict between such regulations and the Bank Board's resolution or action [adopted concurrently with this agreement], the resolution or action shall govern."[2]

---

[2] Although the panel majority states that this language is "lifted" out of context, the context in the Accounting Clause

The government thus expressly agreed that in the event of regulatory change, the negotiated forbearances and accounting procedures would govern. This is surely not an assumption of risk by the contractor, an acceptance of the "vagaries and uncertainties of future legislation", quoting the panel majority. It is a negotiated contract provision that removed this foreseen risk by dealing specifically with an aspect that was critical to the viability of the venture.

D

These contract terms, and the bargained-for consideration on both sides, illuminate a basic flaw in the panel majority's reasoning with respect to the sovereign acts doctrine. For if the enactment of FIRREA is viewed as a sovereign act for the general welfare, unencumbered by specific contractual arrangements, then the relationship between the government as contractor, on the one hand, and these banks on the other hand, would be the same as for any other set of contracting parties. In such case, when the contract is no longer capable of performance on its agreed terms, (whether because of legislative or agency action or Act of God) the laws of contract do not automatically place the burden of accommodation on one side only. *See* Restatement (Second) of Contracts § 272 (discussing forms of available relief such as rescission when contract performance has

---

reinforces the intent that the contract terms shall prevail in case of future conflict. This clause states a straightforward commercial understanding of what the parties intended should a foreseeable event occur. This is simply good contract draftsmanship, for it was fundamental that it was the accounting principles that made the arrangements viable.

become impracticable), § 264 (governmental regulation can render performance impracticable and be subject to relief), and § 377 (remedy of restitution in cases of impracticability and frustration of contractual purpose). The government is not simply excused from further obligations without liability. Thus even if the enactment of FIRREA were treated as a sovereign act it would be incorrect to place on these banks the entire burden of impossibility of performance of their contracts, as has here been done.

However, if the enactment or administration of FIRREA is not viewed as a sovereign act with respect to these contracts, in that it was known and expected that this law would interfere with or make impossible the continued performance of specific contracts by changing the rules of capital compliance, then the government has made performance of its own contracts impossible: not by *force majeure*, as the majority suggests, but by governmental act. That the government may be empowered to legislate in this way, and that a desired public policy is served, does not mean that it can be done without liability to those with whom the government had made a different commitment. The government is not exonerated of responsibility with respect to specific commercial contracts to which it is a party, whether the breach is by executive or legislative action.

Thus, on any application of the sovereign acts doctrine, these plaintiffs have a remedy for breach of contract. I would affirm the decisions of the Court of Federal Claims in these three cases.

ORDER

Aug. 18, 1993.

The appellees, Glendale Federal Bank, FSB, and Statesman Savings Holding Corp., The Statesman Group, Inc., and American Life and Casualty Insurance Co., filed separate petitions for rehearing and suggestions for rehearing in banc. Upon consideration by the panel of the petitions for rehearing and of the responses filed by the appellant at the request of the panel, and the supplemental submissions, it is:

ORDERED that the petitions for rehearing are GRANTED, but only to make the following changes in the text of the opinion:

Page 20:

lines 16-17: Delete "agreed to" and insert therefor—understood respecting how goodwill would be treated—

line 17: Delete "further"

Page 32:

lines 2-3: Delete "quarrel is with" and insert—arguments focus on—

line 4: After "periods" insert—not on the regulations—

lines 4-5: Delete "the regulations merely . . . statute."

Judge Newman's comments on the changes are attached hereto.

Upon consideration of the suggestions for rehearing in banc thereafter by the circuit judges

who are in regular active service, the suggestions are ACCEPTED.

It is FURTHER ORDERED that the judgment of the court entered on May 25, 1993, is vacated and that the opinion of the court, as amended, accompanying the said judgment is withdrawn.

The parties will be advised in due course if additional briefing is needed and of the date of hearing in banc.

NEWMAN, Circuit Judge, commenting on the Order amending the text of the majority opinion.

The reasons for the panel majority's changes are not stated. Thus I write separately to point out that:

(1) These cases do not turn on whether the written arrangements between these banks and the government are designated as "understandings" instead of "agreements". Such semantics do not control the fundamental issues raised.

(2) The now-deleted sentence that "The regulations merely conform to the statute" was indeed incorrect. However, the further statement that the regulations were not placed at issue is also incorrect, for this litigation unambiguously relates to the statute as implemented by the regulations.

APPENDIX C

UNITED STATES CLAIMS COURT

Nos. 90-773C, 90-772C

STATESMAN SAVINGS HOLDING CORP., ET AL., AND GLENDALE FEDERAL BANK, FSB, PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

[Filed July 24, 1992]

OPINION

SMITH, Chief Judge.

Plaintiffs Statesman Savings Holding Corp. (Statesman) and Glendale Federal Bank, FSB (Glendale) both acquired failing savings and loan institutions prior to the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).[1] Both Statesman and Glendale, like the plaintiffs in *Winstar Corp. v. United States*, 21 Cl.Ct. 112 (1990) (*Winstar I*), claim that the enactment of

[1] Pub.L. 101-73, 103 Stat. 183 (Aug. 9, 1989). FIRREA is codified at various sections of Title 12 of the United States Code.

FIRREA breached their contracts with the government and effected a taking in violation of the fifth amendment. Presently before the court are Statesman's and Glendale's Motions for Summary Judgment as to Liability. After careful consideration of the briefs submitted by the parties, and after oral argument, the court grants both motions. The court defers consideration of Statesman's and Glendale's taking claims under the well-established principal that constitutional claims should be addressed only if a plaintiff's other bases for recovery do not afford complete relief. *See Sun Oil Co. v. United States*, 572 F.2d 786, 215 Ct.Cl. 716, 769 (1978). The court also consolidates these cases with *Winstar Corp. v. United States*, No. 90-8C, and certifies them, with *Winstar*, for interlocutory appeal to the United States Court of Appeals for the Federal Circuit.

FACTS

On April 21, 1992, this court issued its opinion in *Winstar Corp. v. United States*, 25 Cl.Ct. 541 (1992) (*Winstar II*), a case presenting legal issues identical to those in dispute here and in other related cases.[2]

[2] As of the date of this opinion, complaints have been filed in fifteen other cases besides *Winstar*, *Statesman* and *Glendale*: *La Van v. United States*, No. 90-581C (filed June 28, 1990); *Barron Bancshares, Inc. v. United States*, No. 90-830C (filed Aug. 28, 1990); *Hometown Financial, Inc. v. United States*, No. 90-843C (filed Aug. 30, 1990); *Hughes v. United States*, No. 90-878C (filed Sept. 5, 1990); *Suess v. United States*, No. 90-981C (filed Sept. 14, 1990); *Castle v. United States*, No. 90-1291C (filed Sept. 25, 1990); *American Heritage Bancorp v. United States*, No. 90-3982C (filed Dec. 3, 1990); *Anderson v. United States*, No. 91-34C (filed Jan. 10, 1990); *Karnes County Savings v. United States*, No. 91-993C (filed Mar. 7, 1991); *Globe Savings Bank, FSB v. United States*, No. 91-1550C (filed

In *Winstar II*, the court considered the nature and effect of pre-FIRREA negotiated agreements between acquiring savings and loans, such as Statesman and Glendale, and the government, acting through the Federal Home Loan Bank Board (FHLBB) and the Federal Savings and Loan Insurance Corporation (FSLIC). This court ruled in *Winstar I* that the agreement between the government and the acquiring savings and loan in that case constituted a contract. This court held in *Winstar II* that the contract was a traditional one, like those upheld by the Supreme Court in *Perry v. United States*, 294 U.S. 330, 55 S.Ct. 432, 79 L.Ed. 912 (1935) and *Lynch v. United States*, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434 (1934), and not a government grant as found in *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41, 106 S.Ct. 2390, 91 L.Ed.2d 35 (1986) (*POSSE*). This court further found that the enactment of FIRREA breached that contract in light of the sovereign acts doctrine. This court deferred consideration of the *Winstar* plaintiffs' taking claim. *See Winstar II*, 25 Cl.Ct. at 543 n. 4.

On the day it issued its opinion in *Winstar II*, the court ordered the parties in all *Winstar*-related cases to address how the court's opinion impacted upon the existence of a contract and the breach of that contract in their particular cases. In a status conference on

---

Oct. 29, 1991); *California Federal Bank, FSB v. United States*, No. 92- 138C (filed Feb. 28, 1992); *Secor Bank, FSB v. United States*, No. 92-247C (filed Apr. 8, 1992); *Republic Savings Bank, FSB v. United States*, No. 92- 265C (filed Apr. 13, 1992); *Glass v. United States*, No. 92-428C (filed June 25, 1992); and *Coast Federal Bank, FSB v. United States*, No. 92-466C (filed July 9, 1992).

May 4, 1992, the court further ordered that an expedited briefing schedule be set in the *Statesman* and *Glendale* cases so that the court could promptly rule on the two plaintiffs' pending motions for summary judgment and thereby enable the parties to seek an interlocutory appeal before the United States Court of Appeals for the Federal Circuit with *Winstar II*. Although Statesman and Glendale moved for summary judgment independently, the court heard oral argument on both motions on June 23, 1992 because *Statesman* and *Glendale* present common legal issues not treated in *Winstar II*. The court resolves Statesman's and Glendale's motions in one opinion.

I. Statesman

At issue in this case is Statesman's 1988 acquisition of four insolvent savings and loans, one in West Palm Beach, Florida, First Federated Savings Bank, and three in Waterloo, Iowa, First Federal Savings, Peoples Savings & Loan, and The Perpetual Savings & Loan. The acquisition was a result of year-long negotiations between Statesman and FHLBB and FSLIC. The negotiations began in 1987 when Statesman approached the FHLBB about acquiring a subsidiary of an insolvent savings and loan institution in Florida, First Federated. In response to Statesman's proposal, FSLIC advised Statesman that the government could assist Statesman in its acquisition of the subsidiary only if it acquired First Federated itself. FSLIC also advised Statesman that under then-existing regulations entities such as Statesman (which were affiliated with investment banking companies) could acquire a failing savings and loan only if the acquired thrift's assets exceeded $500

million. To reach this asset level, FSLIC offered to combine Statesman's acquisition of First Federated with three other thrifts located in Iowa. Statesman accepted FSLIC's offer.

As part of the transaction, FSLIC agreed to provide Statesman with a cash contribution of $60 million. A portion of that contribution, $26 million,[3] was to be permanently credited to Statesman's regulatory capital for purposes of meeting FHLBB's minimum capital requirements. This $26 million figure has been referred to throughout the litigation as a "capital credit."[4] FSLIC also agreed to allow Statesman to employ the purchase method of accounting for the transaction. Under this method, Statesman was permitted to report as an asset includible in capital for purposes of satisfying minimum capital requirements the difference between the aggregate fair market value of liabilities assumed by Statesman and the aggregate fair market value of the assets of the four acquired institutions (including the $60 million cash contribution made by FSLIC). *See generally Winstar I*, 21 Cl.Ct. at 113. This difference in value, known as "supervisory goodwill," was $25.8 million. Statesman was permitted to amortize this intangible goodwill asset on a straight-line basis over a twenty-five year period. In addition to agreeing to acquire the four insolvent thrifts, Statesman agreed

[3] Part of the capital contribution, $5 million, was in the form of a 10-year subordinated debenture delivered to FSLIC by Statesman. Statesman was obligated under the terms of that debenture to pay back $5 million of the $26 million total capital contribution made to Statesman by FSLIC.

[4] "Capital credit" has been a part of only one other *Winstar*-related case before the court, *Globe Savings Bank, FSB v. United States*, No. 91-1551.

to contribute $21 million in cash to the thrifts' capital base.

The terms of the agreement between the government and Statesman were memorialized in an Assistance Agreement. A key provision of the Agreement was an "integration clause," which specified the documents that would control the interpretation of the parties' agreement.

> This Agreement, together with any resolutions adopted by the Bank Board [FHLBB] and documents delivered at closing . . . constitutes the entire agreement between the parties and supersedes all prior agreements . . . excepting only the Acquisition Agreement, the Merger Agreements and any resolutions or letters concerning the Acquisition, the Mergers of this Agreement issued by the Bank Board or the [FSLIC] in connection with the approval of the Acquisition, the Mergers and this Agreement, *provided*, however, that in the event of any conflict, variance, or inconsistency between this Agreement and the Acquisition Agreement or the Merger Agreements, the provisions of this Agreement shall govern and be *binding on all parties* insofar as the rights, privileges, *duties*, *obligations*, and *liabilities of the parties* are concerned.

Assistance Agreement at 96-97 (March 11, 1988) (emphasis in original). One of the documents deemed controlling by the Assistance Agreement was FHLBB Resolution 88-169, which was issued contemporaneously with the Assistance Agreement. In that Resolution, the government expressly agreed to

provide Statesman with the aforementioned capital credit.

> Twenty-one million dollars of the initial contribution by [FSLIC] to [Statesman], and five million dollars of the principal amount of the Subordinated Debenture issued to the FSLIC . . . shall be credited to the regulatory capital account of [Statesman] . . . .

FHLBB Resolution 88-169 at 19 (March 11, 1988); *see also* Assistance Agreement at 45 ("$26 million of the contribution made [by FSLIC] . . . shall be credited to [Statesman's] regulatory capital account and shall constitute regulatory capital . . . ."). In that same Resolution, the government also expressly assented to the use of the purchase method of accounting for the acquisition.

> The value of any unidentifiable intangible assets [goodwill] resulting from accounting for the Acquisition and the Mergers in accordance with the purchase method of accounting may be amortized by [Statesman] over a period not in excess of twenty-five (25) years by the straight line method . . . .

FHLBB Resolution No. 88-169 at 20. In accordance with the terms of the Assistance Agreement, the parties consummated the transaction on March 11, 1988.

In 1989, FIRREA became law. FIRREA altered existing regulations both to reduce the amount of supervisory goodwill includible in calculating core capital and to permit supervisory goodwill to be

amortized for no more than 20 years.[5] *See* 12 U.S.C. §§ 1464(t)(3)(A) and (9)(B); *Winstar I*, 21 Cl.Ct. at 114. FIRREA also established new regulatory capital standards.[6] After FIRREA took effect, Statesman fell below the three new capital standards established by the Act: $13.8 million below the tangible capital standard; $13.2 million below the core capital standard; and $14.5 million below the risk-based capital standard. But for FIRREA, Statesman would be $10.8 million above the tangible capital standard; $11.4 million above the core capital standard; and $7.7

---

[5] FIRREA mandates the phasing out of the use of supervisory goodwill in calculating core capital. Prior to January 1, 1992, the amount of supervisory goodwill includible in core capital cannot exceed 1.5% of total assets. Thereafter, the amount of supervisory goodwill includible in core capital declines each year, so as not to exceed 1.0% of total assets through December 31, 1992; not to exceed 0.75% of total assets through December 31, 1993; and not to exceed 0.375% of total assets through December 31, 1994. 12 U.S.C. § 1464(t)(3)(A).

[6] FIRREA requires federally insured thrifts to satisfy three capital standards: "tangible," "core," and "risk-based" capital. 12 U.S.C. §§ 1464(t)(1), (2) and (3). Thrifts must maintain "tangible" capital in an amount not less than 1.5% of assets excluding supervisory goodwill. 12 U.S.C. § 1464(t)(2)(B). Thrifts must maintain "core" capital in an amount not less than 3% of assets. 12 U.S.C. § 1464(t)(2)(A). Supervisory goodwill may be used in calculating "core" capital, but subject to the schedule set forth in 12 U.S.C. § 1464(t)(3)(A), which decreases the includible amount. *See* note 5, *supra*. Thrifts must maintain "risk-based" capital in an amount not "materially" less than that required by the Comptroller of the Currency for national banks. 12 U.S.C. § 1464(t)(2)(C). Supervisory goodwill is includible for purposes of calculating "risk-based" capital. *Id*.

million above the risk-based capital standard.[7] As a result of Statesman's failure to meet the FIRREA capital standards, the Office of Thrift Supervision (OTS) appointed the Resolution Trust Corporation (RTC) as receiver for Statesman on July 26, 1990. Thus, but for the enactment of FIRREA, Statesman would be operating today.

II. Glendale

The transaction at issue in this case is Glendale's 1981 acquisition of a failing savings and loan institution in Fort Lauderdale, Florida, First Federal Savings and Loan Association of Broward County. Unlike the transactions at issue in *Winstar* and *Statesman*, Glendale negotiated the merger of First Federal into Glendale without initial input from FHLBB or FSLIC. Presumably motivated by economic necessity, First Federal initiated the transaction by contacting Glendale about a possible merger. After negotiation, the parties executed on November 12, 1981 a Merger Agreement pursuant to which the merger ultimately occurred.

The Merger Agreement was expressly conditioned on FSLIC's approval of the merger and its assent to allowing Glendale to use the purchase method of accounting. On November 19, 1981, seven days after the Merger Agreement was signed, Glendale and FSLIC entered into a Supervisory Action Agreement, which manifested the government's approval of

---

[7] By contrast, the court notes that even if the government had honored its obligation to the *Winstar* plaintiffs, Winstar would still most likely have fallen below the three new FIRREA capital standards.

the terms of the merger as set forth in the Merger Agreement.

> [Broward] had incurred significant losses and its financial condition is such that remedial action must be taken.
>
> FSLIC has decided . . . to provide assistance as set forth in this Agreement, having determined that [Broward] is in danger of default and that the nature and/or amount of such assistance would be less than the losses FSLIC would sustain upon the liquidation of [Broward] through a receivership accompanied by the payment of insurance of accounts.

Supervisory Action Agreement at 1-2 (November 19, 1981). As was the case in the Statesman transaction, the Agreement between Glendale and FSLIC contained an integration clause which specified the documents that would control the interpretation of the parties' agreement. The clause provided:

> This Agreement, together with an interpretation thereof or understanding agreed to in writing by the parties, constitutes the entire agreement between the parties thereto and supersedes all prior agreements and understandings of the parties in connection herewith, excepting only the Agreement of Merger and any resolutions or letters issued contemporaneously herewith by the FHLBB or the FSLIC, *provided*, however, that in the event of any conflict, variance or inconsistency between this Agreement and the Agreement of Merger, the provisions of this Agreement shall govern and be binding on all parties insofar

> as the rights, privileges, duties, obligations, and liabilities of the FSLIC are concerned.

Supervisory Action Agreement at 14 (emphasis in original). One of the documents FHLBB issued contemporaneously with the Agreement was a "forbearance letter" dated November 19, 1981. In that letter, the government manifested its intention to forbear from exercising its authority to bring enforcement proceedings against Glendale for failing to satisfy regulatory capital requirements "following the merger." FHLBB forbearance letter (November 19, 1981). The letter, however, did not specifically address the use of the purchase method of accounting for the merger.

Another document designated in the Agreement as controlling the parties' relationship, FHLBB Resolution 81-710, however, did reflect the government's understanding that supervisory goodwill would be part of the transaction. That resolution provided:

> Not later than sixty days following the effective date of the merger, Glendale shall furnish an opinion from its independent accountant, satisfactory to the Supervisory Agent, which (a) indicates the justification under generally accepted accounting principles *for use of the purchase method of accounting for its merger with Broward*, (b) specifically describes, as of the Effective Date, any goodwill or discount of assets arising from the merger to be recorded on Glendale's books, and (c) substantiates the reasonableness of amounts attributed to goodwill and the discount of assets and the resulting amortization periods and methods; and

> Glendale shall submit a stipulation that any goodwill arising from this transaction shall be determined and amortized in accordance with FHLBB Memorandum R-31b; . . .

FHLBB Resolution 81-710 at 2 (November 19, 1981) (emphasis added). The FHLBB Memorandum R 31b referenced in the Resolution specifically dealt with the use of supervisory goodwill in acquisitions of failing or insolvent thrifts. In its first paragraph, the Memorandum stated that its purpose was to

> set[] forth guidelines for the staff of the Federal Home Loan Bank Board in reviewing the proposed accounting, under generally accepted accounting principles, for goodwill arising in the acquisition of a savings and loan association. This intangible asset generally results when the purchase price for an institution exceeds the fair value of the assets acquired, reduced by the fair value of any liabilities assumed. It only arises when the accounting for a business combination is in accordance with the purchase method.

FHLBB Memorandum R 31b at 1 (September 1, 1981). The Memorandum also established forty years as the maximum amortization period for supervisory goodwill. *Id.* at 2.

On March 19, 1982, Glendale supplied to FHLBB the opinion letter outlining the amount of supervisory goodwill used in the merger as required by FHLBB Resolution 81-710. The opinion letter stated:

> Pursuant to the provisions of the Agreement of Merger between [Glendale] and Broward dated November 20, 1981 and the Supervisory Action Agreement between [Glendale] and the Federal

> Savings and Loan Insurance Corporation (FSLIC) dated November 20, 1981, upon the effective date of November 20, 1981, [Glendale] accounted for the acquisition using the "Purchase Method" of accounting . . . . $18,000,000 of the resultant goodwill is associated with the savings deposit base and will be amortized on a straight line basis over 12 years, the estimated life of the savings deposit base. The remaining goodwill of $716,666,000 will be amortized on a straight line basis over 40 years as [Glendale] believes that the remaining goodwill has an indefinite life since it is related to expansion of operations into an entirely new market area.

Letter from David T. Hansen of Glendale to FHLBB (March 19, 1982) (forwarding Peat, Marwick, Mitchell & Co. letter to Glendale). The government does not dispute that the terms of the opinion letter were deemed "satisfactory to the Supervisory Agent" as required by FHLBB Resolution 81-710. It is also uncontroverted that the government manifested its approval of the terms set forth in the opinion letter *prior* to the effective date of the Supervisory Action Agreement. In a letter from H. Brent Beesley, then-Director of FSLIC, to FHLBB dated November 19, 1981, FSLIC recommended the use of the purchase method of accounting for the merger. Beesley explicitly referred to a Peat, Marwick, Mitchell & Co. opinion letter dated November 10, 1981 setting forth the specific amount of supervisory goodwill projected to be amortized pursuant to the merger, assuming the use of the purchase method of accounting. It was only after sending this letter that FSLIC entered into the Supervisory Action Agreement. Taken in conjunction with contemporaneously issued FHLBB letters and resolutions, then, the Supervisory Action Agreement called for the use of the purchase method of accounting and the amortization of an intangible supervisory goodwill asset over periods of twelve and forty years. *See* FHLBB Press Release at 3 (November 20, 1981) ("Glendale Federal will account for this merger under the purchase accounting method which provides that assets and liabilities will be recorded at a fair value on the effective date (11/19/81). Any excess of fair value of liabilities over fair value of assets will be recorded as goodwill. A portion of the goodwill has been associated with the savings deposit base and amortized over the 12-year estimated life of the savings base. Remaining goodwill will be amortized on a straight line basis over 40 years.").[8]

After the enactment of FIRREA in 1989, Glendale remained in compliance with all three new regulatory capital standards set forth in the Act, the "tangible," "core," and "risk-based" capital requirements as defined by 12 U.S.C. § 1464(t)(2). As of March 31, 1992, however, Glendale has fallen out of compliance with the "risk-based" capital standard. In addition, in calculating these three capital amounts, Glendale has

---

[8] The only cash payment involved in the transaction was made pursuant to the interest rate protection provision of the Agreement. Under that provision, Glendale and FSLIC agreed that each would make payments to the other (according to terms set forth in the Agreement) for a five-year period depending on whether the interest rates rose or fell from the time of the merger. If interest rates rose, FSLIC would pay Glendale; conversely, if they dropped, Glendale would pay FSLIC. Pursuant to this provision, Glendale ultimately paid FSLIC $18.4 million.

been required by FIRREA to exclude considerable amounts of supervisory goodwill. In calculating its "tangible" capital, Glendale has been required to exclude from the original $734.6 million of supervisory goodwill agreed to by the parties all goodwill not amortized prior to the enactment of FIRREA. *See* 12 U.S.C. § 1464(t)(2)(B). In calculating its "core" and "risk-based" capital, Glendale has been required under 12 U.S.C. § 1464(t)(3)(A) to deduct all but approximately $185 million of the $734.6 million of goodwill originally contemplated by the parties. Because of FIRREA, Glendale also cannot amortize over forty years the amount of goodwill that is allowable under the Act. *See* 12 U.S.C. §§ 1464(t)(3)(A) and (9)(B). FIRREA has also caused Glendale to suffer monetary loss. The exclusion of supervisory goodwill has: required Glendale to implement costly measures to compensate for the loss of goodwill from its regulatory capital amounts; constrained capital resources and thereby restricted business opportunities; and adversely affected the confidence of Glendale's investors.

DISCUSSION

I. The Existence of a Contract

A. *Statesman*

In *Winstar I*, this court examined the various documents memorializing the parties' intentions and determined that an implied-in-fact contract existed. *Winstar I*, 21 Cl.Ct. at 114-15. Here, by contrast, the government readily concedes that an express contract existed, at least in regard to the $26 million capital credit extended by the government to Statesman. In regard to the supervisory goodwill at issue, the government simply argues that because there was

an express contractual relationship, embodied in the Assistance Agreement, the absence of any reference in that Agreement to the use of the purchase method of accounting necessarily implies that there was no contractual agreement as to that term. Plaintiff conversely argues that, taken together, the documents comprising the parties' relationship expressly provide for the use of supervisory goodwill.

The issue of whether a contractual right to use supervisory goodwill existed turns on a proper interpretation of the integration clause in the Assistance Agreement. As noted above, the integration clause provided that the parties' contractual relationship was defined not only by the Assistance Agreement, but also by contemporaneously issued FHLBB resolutions and documents relevant to the transaction: "This [Assistance] Agreement, together with any resolutions adopted by the Bank Board [FHLBB] and documents delivered at closing . . . constitutes the entire agreement between the parties and supersedes all prior agreements . . . ." Assistance Agreement at 96-97. The plain language of this clause indicates that all FHLBB resolutions delivered at closing constituted binding provisions of the parties' express contract. The clause thus clearly encompasses FHLBB Resolution 88-169 which was issued the same day as the Assistance Agreement. Accordingly, because FHLBB Resolution 88-169 provided for the use of the purchase method of accounting, the court finds that the government and Statesman had an express contract providing for the use of that accounting method. This reading of the integration clause finds support from those courts construing similar assistance agreements. *See, e.g., Hansen Savings Bank v. Office of Thrift Supervision*, 758 F.Supp. 240, 245

(D.N.J.1991) (finding an FHLBB resolution and forbearance letter incorporated by an integration clause as part of the parties' agreement); *Transohio Savings Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 617-18 (D.C.Cir.1992) (same); *Carteret Savings Bank, FA v. Office of Thrift Supervision*, 762 F.Supp. 1159, 1171-72 (D.N.J.1991) (same), *rev'd on other grounds*, 963 F.2d 567 (3d Cir.1992).

B. *Glendale*

Although the specific terms of the agreement between the government and Glendale are not as easily derived from the relevant documents as is the case in *Statesman*, the court nonetheless is compelled to reach the same conclusion: that an express contract existed between the government and Glendale. As in *Statesman*, the government and Glendale entered into an express agreement (the Supervisory Action Agreement) regarding the government's approval and role in Glendale's acquisition of a failing savings and loan. Also like *Statesman*, the express agreement refers explicitly to documents calling for the use of the purchase method of accounting.

The government maintains, however, that there was no contractual relationship, express or implied, between the government and Glendale. As it does in the *Statesman* case, the government argues that the Supervisory Action Agreement constitutes the only expression of the parties' understanding concerning the merger of Glendale and Broward and the government's role in that merger. In support of its position, the government points to the language of the integration clause, which is materially the same as the one at issue in *Statesman*.

> This Agreement, together with an interpretation thereof or understanding agreed to in writing by the parties, constitutes the entire agreement between the parties thereto and supersedes all prior agreements and understandings of the parties in connection herewith, *excepting only the Agreement of Merger and any resolutions or letters issued contemporaneously herewith by the FHLBB or the FSLIC* . . . .

Supervisory Action Agreement at 14 (emphasis added). The government contends that the FHLBB resolutions and letters issued contemporaneously with the Agreement do not reflect actual terms of the parties' contractual relationship. The government argues that these resolutions should not be read in conjunction with the Supervisory Action Agreement because that Agreement only incorporates "interpretation[s]" and "understanding[s] agreed to in writing by the parties."

This reading of the integration clause, however, if not totally wooden, is directly at odds with the clause's plain language. The government ignores the "excepting" phrase of the clause and argues that all documents other than the Supervisory Action Agreement must, to be part of the parties' agreement, interpret an "understanding agreed to in writing by the parties." The "excepting" phrase, however, exempts both the Agreement of Merger and "any resolutions or letters issued contemporaneously" by FHLBB or FSLIC from such a qualification. These documents, as the language of the integration clause makes clear, are specifically excepted from the first phrase of the clause and need only be relevant to the

Agreement and the merger transaction to have meaning in regard to the contractual terms and intentions of the parties. The government thus cannot suggest that the integration clause *precludes* the court from considering these FHLBB resolutions and forbearance letters in construing the nature and terms of the contractual relationship between the government and Glendale.

The government also attempts to distinguish this case from *Winstar* by arguing that the forbearance letter in this case differs materially from the one found critical to determining the nature of the parties' agreement in *Winstar I*. The *Winstar* forbearance letter explicitly "confirmed" the parties' "understanding" in regard to the use of supervisory goodwill. *See Winstar I*, 21 Cl.Ct. at 115. The Glendale forbearance letter, by contrast, does not mention the use of supervisory goodwill. This fact alone, however, does not contradict the court's finding that an express contract existed in regard to the use of the purchase method of accounting. The court's ultimate finding in regard to the existence of a contract is based not only on the forbearance letter, but on the other contemporaneous documents flowing between the parties. As discussed above, these documents—the Supervisory Action Agreement, FHLBB Resolution 81-710, FHLBB Memorandum R 31b, the November 10, 1981 and March 19, 1982 Peat, Marwick, Mitchell & Co. opinion letters, and the November 19, 1981 letter from the Director of FSLIC, H. Brent Beesley to FHLBB—reflect the parties' express understanding regarding the use of supervisory goodwill amortized over twelve-year and forty-year periods of time. The forbearance letter merely confirms what is eminently clear from these

other documents: that FHLBB agreed to forbear from exercising its authority to bring enforcement proceedings against Glendale for failure to meet regulatory capital standards.

II. Contract Breach

A. *Statesman*

In *Statesman*, as in *Winstar*, the issue of contract breach is a relatively straightforward one. By enacting FIRREA, the government "altered existing regulations both to reduce the amount of supervisory goodwill includible in calculating core capital and to permit supervisory goodwill to be amortized for no more than twenty years." *Winstar II*, 25 Cl.Ct. at 549. As this court held in *Winstar II*, the act of altering the terms of the parties' original agreement, "absent a countervailing contractual right to do so," constituted a breach of contract entitling Statesman to damages or restitution. *Id.* at 550.

The government contends, however, for the first time in this two year-old litigation, that in this case, unlike in *Winstar*, the government possessed such a countervailing contractual right to alter the terms of the parties' original agreement.[9] The provision of the Assistance Agreement which accords the government this right, the government argues, is the so-called "unlawful inaction clause." The clause provides:

---

[9] The government raised this argument for the first time in *Statesman* on June 12, 1992, in its Response to Plaintiffs' Status Report. In *Glendale*, the government first raised this argument in its October 15, 1990 Motion to Dismiss. To date, the government has not raised this argument in *Winstar*.

> This Agreement and the parties' rights and obligations under it shall be governed by the law of the State of Iowa, to the extent that Federal law does not control. *Nothing in this Agreement shall require any unlawful action or inaction by either party.*

Assistance Agreement at 96 (emphasis added). The government maintains that this clause unambiguously provided that, although the government agreed that Statesman could treat the $26 million capital credit and $25.8 million in supervisory goodwill as capital for purposes of satisfying minimum regulatory capital standards, the government made no commitment that Statesman could continue to do so if statute or regulation later provided to the contrary. The government argues that a failure by OTS to give effect to FIRREA's provisions would have constituted "unlawful inaction" on the government's part.

After examining both the language and location of the clause, however, the court must reject the government's interpretation of the "unlawful inaction clause." The clause, embedded within the Governing Law section of the Assistance Agreement, is a boilerplate clause which is contained within several of the Assistance Agreements at issue in the *Winstar*-related cases presently before this court, including *Winstar* itself. The fact that the government has made this argument in only one other case, *Glendale*, and only at this late juncture in *Statesman* certainly undermines the government's contention that this clause constituted a specially negotiated and unambiguous contractual right to alter the terms of the parties' original agreement. In the *Statesman* case alone, this identical clause is contained within the

four merger agreements by which Statesman acquired the four insolvent thrifts. In the drafting of those four documents, Statesman and the four insolvent thrifts had no concerns, as the government and Statesman did in the context of drafting the Assistance Agreement, about continuing obligations or executory terms that might be subject to a future change in law. It defies logic to suggest that the "unlawful inaction clause" has one meaning in the context of the four merger agreements and a different, and in this case dispositive, meaning in the context of the Assistance Agreement. Moreover, if this clause is given the meaning the government urges, the clause would contradict another provision of the Assistance Agreement providing that "[n]o amendment or modification of this Agreement shall be binding unless executed in writing by the parties or their successors." Assistance Agreement at 97. If the parties thus had agreed not to modify or vary the terms of the agreement without mutual consultation and bargain, it would flout reason to believe that the parties had also agreed to allow the government to retain the power to alter the terms of the agreement at will.

A narrower reading of the clause is more plausible and logical under the circumstances of this and other *Winstar*-related cases. The clause was designed to ensure that the contract would not be read to require a violation of any *then-existing* state or federal laws. No party in any *Winstar*-related case would contest the fact that the transactions at issue were complex and negotiated under severe time pressures. In this regard, the *Statesman* case is typical. The transaction involved four thrifts located in two states. The clause was undoubtedly included within the governing

law section of the assistance agreements as a protective measure to ensure that the parties had not inadvertently agreed to violate laws in effect at the time the parties contracted.

Moreover, to read the clause as the government suggests would require the court to view the agreement as an illusory bargain. If the clause in fact reserved to the government the right to cancel without liability its obligations should Congress or FHLBB in the future change the relevant statutory or regulatory scheme, then the contract could not be binding. Under such a contract, the government would in effect be agreeing to abide by its promises only so long as it unilaterally decided to keep those promises. A contract so construed would not be an enforceable contract. *See Flagship Fed. Sav. Bank v. Wall*, 748 F.Supp. 742, 748 (S.D.Cal.1990) (finding an agreement between the government and an acquiring savings and loan "illusory" because the government "had the right at any time to cancel its side of the bargain" without liability); *see also* 17 C.J.S. *Contracts* § 98 ("[A] promise, the performance of which depends on the mere option, will, inclination, or discretion of the promisor, as where the promisor is free to perform his promise or withdraw from the arrangement at his unrestricted pleasure, is merely illusory, and is insufficient consideration for the promise made by the other party."). The court will not read contracts, negotiated with care over many months as illusory, based upon a boilerplate clause. As the Supreme Court observed in quoting Alexander Hamilton, a contract with the government so construed would

> involve two contradictory things: an obligation to do, and a right not to do—an obligation to pay a certain sum, and a right to retain it in the shape of a tax. It is against the rules, both of law and of reason, to admit by implication in the construction of a contract a principle which goes in destruction of it.

Murray v. Charleston, 96 U.S. 432, 445, 24 L.Ed. 760 (1877).

Even assuming that the government considered reserving the right to unilaterally cancel its obligations without liability, the court points out that the government knew exactly how to make such a reservation when that was its intent. In *Guaranty Financial Services v. Ryan*, 928 F.2d 994, 999 (11th Cir.1991), the parties' agreement provided that "[a]ll references to regulations of the [FHLBB] or the FSLIC used in this Agreement shall include any successor regulation thereto, it being *expressly understood* that subsequent amendments to such regulations may be made and that *such amendments may increase or decrease the Acquiror's obligation under this Agreement*." (Emphasis supplied by the court). Similarly, in *Flagship Fed. Sav. Bank v. Wall*, 748 F.Supp. at 748, the forbearance letter expressly incorporated as part of the parties' agreement provided that "the FHLBB specifically reserves a right to cancel the forbearance at any time if it should find that the forbearance is unsafe or unsound or otherwise actually or potentially detrimental to Flagship." The government, therefore, knew how to reserve to itself the right to change the contract based on a change of law. The government in fact negotiated for that right in some cases.

The court accordingly finds that the government possessed no contractually-based right allowing it to abrogate without liability the parties' express contract. The government thus could not be immune from the consequences of its breach unless the enactment of FIRREA was found to be a sovereign act within the meaning of the sovereign acts doctrine. The court concluded in *Winstar II*, however, that FIRREA was not a sovereign act. *Winstar II*, 25 Cl.Ct. at 550-53. As the court noted, under the sovereign acts doctrine, "the government is not contractually liable, absent an express agreement to the contrary, for the consequences of acts performed in its sovereign capacity." *Id.* at 550. The doctrine, however, could not apply in that case, and by the same reasoning in the present cases, because

> taking away plaintiffs' rights in [§§ 1464(t)(3)(A) and (9)(B)] of FIRREA was not the necessary means to a broad public end, rather it was the government's end goal. On the government's reasoning, *any* statute breaching a contract would be immune under the doctrine merely because its purpose was to breach the contract. This court has never granted government immunity on such a basis . . . . Although the court accepts as given that the government sought to promote the public welfare in enacting FIRREA as a whole, those specific provisions of the Act altering the capital treatment of supervisory goodwill were intended to, and did, impact only upon plaintiffs and those similarly situated entities who had acquired savings and loan institutions. This fact compels the conclusion

> that sovereign act immunity cannot adhere in this and related cases.

Id. at 552 (emphasis in original). In enacting FIRREA, the government therefore became liable to plaintiff for damages or restitution.

In making this finding, the court notes that it is irrelevant for purposes of determining liability that the government's promise in this case included a capital credit. In *Winstar*, the government's consideration for the agreement only included its assent to the use of supervisory goodwill in satisfying regulatory capital requirements. Here, by contrast, the government agreed not only to allow the use of supervisory goodwill, it also promised to allow a capital credit of $26 million to Statesman. Although FIRREA is silent in regard to capital credits, the government has read FIRREA as disallowing their use in meeting minimum capital requirements. The court cannot find any reason for treating capital credits differently than supervisory goodwill: the government is liable to Statesman for its decision not to honor either of these promises.

B. *Glendale*

As in *Statesman*, the government hinges its contention that FIRREA does not constitute a breach on the "unlawful inaction clause" contained within the parties' Supervisory Action Agreement. The clause in this case, also embedded within the Governing Law section of the Agreement, contains the same language as the clause at issue in *Statesman*.

> This Agreement and the rights and obligations of the parties hereunder shall be governed by the law of the State of California, to the extent that

> Federal law does not control. *Nothing in this Agreement shall require any unlawful action or inaction by either of the parties hereto.*

Supervisory Action Agreement at 15 (emphasis added).[10] The government's arguments regarding the meaning and effect of this clause mirror those put forward in *Statesman*. Thus for the reasons set forth in *Statesman* above, the court accordingly holds that the "unlawful inaction clause" in the parties' Agreement did not afford the government a contractually-based right allowing it to abrogate without liability the parties' express contract. The government, therefore, is liable to Glendale for damages or restitution.[11]

---

[10] The Supervisory Action Agreement, as the one in *Statesman*, contained an express limitation on the ability of the parties to vary the terms of the original Agreement: "[n]o subsequent modification or termination of this Agreement shall be binding unless set forth in writing and executed by the parties or their proper successors." Supervisory Action Agreement at 15.

[11] In its Motion to Dismiss, the government argued that Glendale's claims for monetary damages were not ripe as Glendale admittedly met FIRREA's capital requirements at the time it filed its complaint. As of March 31, 1992, however, Glendale has fallen out of compliance with the "risk-based" capital standard set forth in FIRREA. (Glendale was $43 million short of meeting that standard as of March 31, 1992.) As a result, Glendale was required to submit to OTS on June 1, 1992, a capital restoration plan for returning Glendale to capital compliance. A failure by Glendale to comply with that plan subjects it to regulatory sanctions, including seizure. *See* 12 U.S.C. § 1464(t)(6). As noted above, FIRREA has also caused Glendale to suffer monetary loss. Without the inclusion of supervisory goodwill in calculating its capital amounts,

III. *Transohio Savings Bank v. Director, Office of Thrift Supervision*

In these and all other *Winstar*-related cases, the government has interpreted the Supreme Court's ruling in *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 106 S.Ct. 2390, 91 L.Ed.2d 35 (1986) (POSSE), to mandate that a contract cannot exist between the plaintiffs and the government. In support of this position, the government has invoked the United States Court of Appeals for the District of Columbia Circuit's recent decision in *Transohio Savings Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598 (D.C.Cir.1992). In that decision, the court affirmed the district court's denial of a preliminary injunction sought by an acquiring savings and loan similarly situated to Winstar, Statesman and Glendale. The injunction, if granted, would have enjoined OTS from enforcing those provisions of FIRREA disallowing and reducing the use of supervisory goodwill in the context of regulatory mergers.[12] Although the

---

Glendale has been forced to: implement costly measures to compensate for the loss of goodwill; constrain capital resources; and lose business opportunities and investor confidence. Glendale, therefore, has suffered an injury sufficiently ripe for adjudication in this court.

[12] All four United States Courts of Appeals which have reviewed preliminary injunction motions seeking to enjoin OTS have ruled against such motions. *See Carteret Sav. Bank, FA v. Office of Thrift Supervision*, 963 F.2d 567 (3d Cir.1992); *Far West Fed. Bank v. Director, Office of Thrift Supervision*, 951 F.2d 1093 (9th Cir.1991); *Guaranty Fin. Servs., Inc. v. Ryan*, 928 F.2d 994 (11th Cir.1991); *Franklin Fed. Sav. Bank v.*

Transohio court explicitly acknowledged that the district court did not have jurisdiction over the acquiring thrifts "pure contract claims," *see Transohio*, at 601 ("We find . . . that the district court did not have jurisdiction over Transohio's pure contract claims because only the Tucker Act, 28 U.S.C. § 1491(a)(1), waives sovereign immunity for Transohio's contract claims, and the Tucker Act provides for jurisdiction in the Claims Court alone."), the court considered the merits of the plaintiff's contract arguments in evaluating the acquiring thrifts' statutory and due process claims. *Id.* In reaching the merits, the *Transohio* court upheld, and in some respects expanded upon, the position taken by the government on the teaching of POSSE in the present litigation, a position obviously at odds with the conclusions reached by this court in *Winstar II*. *See Winstar II*, 25 Cl.Ct. at 545 ("[T]he [Supreme] Court's holding in POSSE in no way precludes this court from finding the existence of a contract between the government and plaintiffs. As is evident from its opinion, the Court in POSSE recognized that the government has the power to enter into contracts which confer vested rights—rights which the government has a duty to honor."). As the parties here have argued the *Transohio* decision in their briefs, it is therefore this court's duty to consider its reasoning. While this court is only bound by the United States Court of Appeals for the Federal Circuit's precedent (and of course that of the Supreme Court), it certainly

---

Director, Office of Thrift Supervision, 927 F.2d 1332 (6th Cir.), *cert. denied*,—U.S.—, 112 S.Ct. 370, 116 L.Ed.2d 322 (1991).

gives due consideration to the views of other courts when not inconsistent with our circuit.

A. The Issues

In reviewing the district court's denial of a motion for a preliminary injunction filed by the acquiring thrift, the *Transohio* court recognized that a contract existed between the acquiring thrift, Transohio Savings, and the government. *Transohio*, at 618 ("We agree with Transohio [Savings] . . . that the circumstances of the mergers support a finding that the transaction reflected a voluntary bargain, the terms of which were freely negotiated by the parties and binding on them."). Having recognized the existence of a contract, the court proceeded to address two issues raised in the present litigation: (1) whether, in light of the POSSE decision, that contract was one which could bind Congress' power to regulate and (2) whether FHLBB and FSLIC possessed the power to enter into such a contract. *Id.* at 617. After examining the terms of the parties' contract and the statutory language delegating contracting authority to FHLBB and FSLIC, the court found that the answer to the above framed issues was "no." *Id.* at 620, 624. This court addresses these issues and the *Transohio* court's analysis of them in turn.

B. "Alleged Power of Agency to Bind Congress"

The *Transohio* analysis of plaintiffs' contract claims offers a novel conception of government structure which is inconsistent with how this court has historically viewed the creation of rights in our constitutional system. Whether an agency has the power to bind Congress is a false issue in all of the *Winstar* cases. Under our constitutional structure, each branch of government has its respective role and

each is equally bound by the Constitution and the laws established by the constitutional process. *See I.N.S. v. Chadha*, 462 U.S. 919, 951, 103 S.Ct. 2764, 2784, 77 L.Ed.2d 317 (1983) ("The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility."). All agencies of the executive branch, other than the President, are established by the Congress, with certain powers and certain duties. By exercising these powers and fulfilling these duties an agency immediately and continuously creates legal effects on private rights. This exercise of power in no way "binds" Congress as a legislative body. It can, however, and continuously does, create rights on the part of private individuals that are held against and restrict government action. Once a salary check is paid, a surplus auto sold, a grant finally delivered, a license issued, a promotion secured, a contract let, or a title transferred, a legal right is created that under the Constitution binds the government. That property right cannot be taken away or diminished by the government without process of law, and in many cases even with process of law, it is immune to recapture. To suggest, then, that an agency action cannot confer rights which the government must honor is to suggest a notion that is as novel as it is anathema to our constitutional system. The power of Congress to legislate is no more bound by the contracts in these cases than it is by the sale of a piece of land by an agency that was authorized by Congress to sell that land. Once the land or action has been taken, Congress cannot return, absent a common law legal right

to do so, to the pre-existing legal condition. Once the land is sold or the right granted there is a new legal reality.

On this point, James Madison observed:

> It is agreed on all sides that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident that none of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers. It will not be denied that power is of an encroaching nature and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each, against the invasion of the others.

THE FEDERALIST No. 48 (James Madison).

In the present cases, as in *Transohio*, what the acquiring thrifts were in fact required to show was that FHLBB and FSLIC unmistakably contracted with them regarding the use of supervisory goodwill and, in some cases, the use of capital credit. This court, as the *Transohio* court, has found that the rights the acquiring thrifts rely on for recovery "were freely negotiated by the parties and binding on them." *Transohio*, at 618. As the *Transohio* court made clear, "[t]he agencies had no power to compel Transohio to purchase the insolvent thrifts; nor do the banking regulators' promises to Transohio

amount to a mere benefit bestowed on the thrift by the largesse of the government." *Id.* The rights at issue here are thus akin to those at issue in *Perry* and *Lynch*. In exchange for legally binding consideration, the government entered into unmistakable contracts conferring vested rights.

In recognizing that binding contractual rights were created and that those rights must be honored, the court stresses what the contrary conclusion entails. The *Transohio* court interpreted the contract between the government and the acquiring thrifts as embodying nothing more than a gamble: "[W]e interpret the contract provisions at issue to mean that the agencies would allow [the acquiring thrift] to treat supervisory goodwill as regulatory capital only as long as the regulatory regime permitted the agencies to do so." *Transohio*, at 620; *see also Guaranty*, 928 F.2d at 999 ("By signing the contract, [the acquiring thrift] took that chance, in effect wagering the chance that the rules would be changed against the potential return if they were not."). Such an interpretation runs counter to the purpose behind the establishment and continued existence of this court. The Claims Court and its predecessor, the Court of Claims, was formed with the purpose of instilling confidence in dealing with the federal government that the government would honor its obligations to its citizens. The court was thus conceived pursuant to the idea, eloquently expressed by President Abraham Lincoln, that "[i]t is as much the duty of government to render prompt justice against itself, in favor of citizens, as it is to administer the same, between private individuals." W. Cowen, P. Nichols, Jr. and M. Bennett, *The United States Court of Claims: A History*, *reprinted in* 216

Ct.Cl. 1, 20-21 (1978) (quoting 62 Cong. Globe, 37th Cong., 2d Sess., App. at 2 (1862) (President Lincoln's 1861 Annual Message to Congress) (emphasis omitted)). To conclude that all dealings with the government constitute nothing more than "a very elaborate and expensive form of gambling," *Winstar II*, 25 Cl.Ct. at 548, is thus at variance with the very ideal upon which this court, the Tucker Act, and ultimately the rule of law is based.

C. *The Unmistakability Doctrine*

In determining whether the contract between the government and Transohio Savings could bind Congress' power to regulate, the *Transohio* court looked to the language of the parties' agreement. The *Transohio* court proceeded from the assumption that " 'one who wishes to obtain a contractual right against the sovereign that is immune from the effect of future changes in law must make sure that the contract confers such a right in unmistakable terms.' " *Transohio*, at 618 (quoting *Western Fuels-Utah, Inc. v. Lujan*, 895 F.2d 780, 789 (D.C.Cir.), *cert. denied*,—U.S.—, 111 S.Ct. 47, 112 L.Ed.2d 24 (1990)). The court labelled this principle the "unmistakability doctrine," a "special rule of contract interpretation that applies to contracts with the government." *Transohio*, at 619. Examining the language of the parties' contract, the court concluded that there was "no unmistakable waiver of Congress' regulatory power" and that therefore the government was free to enact FIRREA and breach the parties' contract without liability. *Id.* at 620.

In so construing the unmistakability principle, the *Transohio* court severed the doctrine from its historic moorings. The doctrine has stood for the

proposition that any obligation to a private party on the part of the government cannot be implied or presumed, but must be "expressed in terms too plain to be mistaken." *Jefferson Branch Bank v. Skelly*, 66 U.S. (1 Black) 436, 446, 17 L.Ed. 173 (1861). In the Contract Clause[13] cases from which the doctrine arose, it was consistently held to mean that courts must strictly construe contract terms to ensure that any sovereign power of the state, specifically its power to tax, is not constrained without an express intention by the state to bind itself. *See, e.g.*, *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514, 561-63, 7 L.Ed. 939 (1830) ("That the taxing power is of vital importance; that it is essential to the existence of government; are truths which it cannot be necessary to reaffirm. As the whole community is interested in retaining it undiminished; that community has a right to insist that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the State to abandon it does not appear."); *Keefe v. Clark*, 322 U.S. 393, 396-97, 64 S.Ct. 1072, 1073-74, 88 L.Ed. 1346 (1944) ("Before we can find impairment of a contract we must find an obligation of the contract which has been impaired. Since the contract here relied upon is one between a political subdivision of a state and private individuals, settled principles of construction require that the obligation [to not levy a tax in the future] alleged to

[13] The Contract Clause of the Constitution provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. CONST. art. I, § 10. The Clause has been understood as "limit[ing] the power of the States to modify their own contracts as well as to regulate those between private parties." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17, 97 S.Ct. 1505, 1515, 52 L.Ed.2d 92 (1977).

have been impaired be clearly and unequivocally expressed . . . . 'The continued existence of a government would be of no great value, if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation,' "(quoting *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 548, 9 L.Ed. 773 (1837))). In other words, courts must examine whether, *in regard to the sovereign power alleged to be constrained*, "[a]ll the basic elements of contract formation [are] present: capacity and mutual intent to contract, arms length negotiation, and the exchange of real obligations for real benefits." *Winstar II*, 25 Cl.Ct. at 547.

The purpose of the doctrine in the context of the Contract Clause was obviously to safeguard the sovereign power of states. The Court recognized that a state's ability to exercise its sovereign powers is so important to the welfare of the general public that any limitation on that ability must be expressed in clear and explicit terms. The Court, however, never held that states could not be bound when they entered into unmistakable contracts. In *Jefferson Branch Bank*, for example, the Court considered whether a bank's state-granted charter created a contract right exempting the bank from taxation imposed by a subsequent statute. In holding that the bank possessed such a right, the court invoked the unmistakability doctrine's historic purpose:

> [T]he vital importance of a State's right to tax was considered, and the relinquishment of it by a State has never been presumed. That language of the court has always been cautious, and affirmative of the right of the State to impose taxes, unless it has relinquished by unmistakable

> words, clearly indicating the intention of the State to do so. *This court has always said and acted upon it: We will not say that a State may not relinquish its right to tax in particular cases*, or that a consideration sufficiently valuable to induce a partial increase of it may not exist, but as the whole community is interested in preserving it undiminished, it has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of a State to abandon it does not appear.

Id. 66 U.S. (1 Black) at 447, 17 L.Ed. at 179 (emphasis added).

The purpose animating the unmistakability doctrine makes it clear that the doctrine controls how contractual rights with the government are *created*, *i.e.* whether the government has agreed in unmistakable terms to be contractually bound. The doctrine never has been understood as controlling, as the government has alleged in the *Winstar*-related cases, the effect of the government's breach of a contract. *See United States Trust Co. v. New Jersey*, 431 U.S. at 23, 97 S.Ct. at 1518 ("Th[e] [unmistakability] doctrine requires a determination of the State's power to create irrevocable contract rights in the first place, rather than an inquiry into the purpose or reasonableness of the subsequent impairment."). The doctrine solely goes to whether a party possesses contractual rights which are binding and for which damages may be given.

Thus, in *Winstar* and the instant cases, there has been little serious dispute that the government granted the acquiring thrifts, in the clearest possible terms, the right to certain types of regulatory capital

treatment. Likewise, the acquiring thrifts have never contended in this court that the government is bound to specifically perform on this obligation. Rather, the dispute has primarily raged over the question of breach. Namely, whether the government must pay damages or provide restitution for its breach, or whether it is excused from such damages by an interpretation of POSSE or the sovereign acts doctrine. The historical understanding of the unmistakability doctrine is not applicable to this issue.

This court's understanding of the unmistakability doctrine is thus at odds with the *Transohio* court's analysis. The *Transohio* court held that the government always possesses the power to amend its laws (even if in exercising that power the government alters the terms of an agreement with a private individual) *except* where the private individual has secured in unmistakable terms the government's promise to waive that power in the future. *Transohio*, at 618. In other words, the government has the power to breach a contract with a private individual unless it unambiguously waives that right to breach in the contract itself. This analysis fails to recognize that the "unmistakability" requirement relates to the nature of an agreement between the government and a private individual, *i.e.* whether it is contractual or not. This is also the teaching of POSSE. If an agreement of the government to forbear from the exercise of one of its sovereign powers is unmistakably found to be a term of a contract with a private individual, then the government cannot breach the contract without liability. *See Sinking-Fund Cases*, 99 U.S. 700, 719, 25 L.Ed. 496, 504 (1878) ("The United States are as much bound by their contracts

as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or municipality or a citizen.").

The Supreme Court has never interpreted the unmistakability doctrine as requiring an explicit reference in the contract to the waiver of Congress' power to legislate in the future. In *Perry*, for example, the Court found a binding contractual obligation on the part of the government, which could not be altered by subsequent legislation, even though the bond forming the basis of the parties' agreement never referred to Congress' power to legislate. The government's obligation as expressed in the bond merely provided that "[t]he principal and interest hereof are payable in United States gold coin of the present standard of value." *Perry*, 294 U.S. at 347, 55 S.Ct. at 433; Act of September 24, 1917, ch. 56, 40 Stat. 288 (1917). No words in the bond referred explicitly to the fact that the government had bound Congress' power to alter the terms of the bond in the future. *See also Lynch*, 292 U.S. at 577-79, 54 S.Ct. at 842-44 (finding that Congress could not abrogate without paying compensation a contract to provide war risk insurance where the statute constituting the contract, Act of October 6, 1917, ch. 105, Sec. 402, 40 Stat. 409 (1917), made no reference to Congress' power to legislate); *United States Trust Co. v. New Jersey*, 431 U.S. at 9-10, 97 S.Ct. at 1511-12 (finding that New Jersey and New York could not abrogate the terms of bonds held by private individuals where the statute defining the terms of the bonds did not mention the power of either state to legislate). To read the unmistakability doctrine as requiring explicit reference to Congress' sovereign power in the contract is to exalt the words of a contract over the substance of an unmistakable bargain struck between the government and its citizens.

D. *Statutory Delegation and the Unmistakability Doctrine*

In determining whether FHLBB and FSLIC possessed the power to enter into a contract which could "bind" Congress' power to regulate, the court applied its interpretation of the unmistakability doctrine to statutory delegations of power to executive branch agencies. The court ruled that

> [i]n the context of contracts entered into by administrative agencies . . . the unmistakability doctrine has two components: the contract relinquishes Congress' power to regulate only when (1) the agency, in the contract, has unmistakably waived Congress' regulatory authority, and *(2) Congress, in a statute, has unmistakably delegated to the agency the power to surrender Congress' regulatory authority.*

Transohio, at 621 (emphasis added). The court reasoned that the only alternative to requiring an unmistakable delegation by Congress to agencies concerning Congress' regulatory authority would be "reading broad congressional delegations of power as including the power to preclude future congressional regulatory legislation," an alternative which "would seriously undermine the constitutional scheme of separation of powers." *Id.* at 622. The *Transohio* court conjectured that such broad delegations would erode the separation of powers between the executive and legislative branches because they "would allow

federal agencies to supplant congressional policy-making by contracting away Congress' power to legislate." *Id.*

This analysis, however, must be rejected because of its assumption that the acquiring thrifts in these cases claim to have bound Congress' power to regulate. They make no such claim. The acquiring thrifts merely assert that they entered into unmistakable contracts with the government regarding the treatment of supervisory goodwill. As this court ruled in *Winstar II*,

> the government's power to regulate must operate within the context of plaintiffs' contract rights. While Congress clearly may alter the regulatory treatment of supervisory goodwill, it must also honor the plaintiffs' rights. The government may breach the contract, but it must pay for the damages the plaintiffs suffer. Any alteration of this principle would undercut our democratic system. It would allow governmental policies to be paid for with a minority's rights.

Winstar II, 25 Cl.Ct. at 549. In extending an unmistakability requirement to the statutory delegation of authority to FHLBB and FSLIC, the *Transohio* analysis creates new law at odds with historic contract interpretation.

FSLIC's clear statutory mandate also belies the conclusion that only explicit delegations surrendering Congress' power to regulate can create real rights. FSLIC was given broad authority *by Congress* to assist and participate in acquisitions of unhealthy or insolvent thrifts by healthy and solvent ones.

> In order to facilitate a merger or consolidation of an insured institution . . . with another insured institution or the sale of assets of such insured institution and the assumption of such insured institution's liabilities by another insured institution, [FSLIC] is authorized, *in its sole discretion and upon such terms and conditions as [FSLIC] may prescribe*—
>
> . . . . .
>
> (iii) to guarantee such other insured institution . . . against loss by reason of such other insured institution's merging or consolidating with or assuming the liabilities and purchasing the assets of such insured institution . . . .

12 U.S.C. § 1729(f)(2)(A) (emphasis added). This statutory delegation, in conjunction with FSLIC's congressionally authorized power to enter contracts, *see* 12 U.S.C. § 1725(c)(3) (FSLIC "shall have power . . . to make contracts"), makes it clear that FSLIC possessed the power to enter into binding agreements with acquiring savings and loan institutions. The *Transohio* court's expressed concern that if FSLIC indeed had the authority to enter into contracts with acquiring thrifts that "agencies would be making laws not pursuant to congressional direction, but over Congress' objections" is therefore unpersuasive. It is also a concern that the Congress obviously rejected when it authorized FSLIC to enter into these transactions and execute these contracts. It is hardly the function of courts to provide Congress advice on the political dangers of delegating legal authority to federal agencies. In according FSLIC the authority to contract, Congress made a policy decision to give FSLIC the power to bind the government. FSLIC,

therefore, cannot be held to have exceeded its authority because it possessed, by an act of Congress, the power to bind the government and thereby confer vested contractual rights.

Perhaps at the core of this court's difficulty with accepting *Transohio*'s reasoning is that decision's conception of government structure. Congress under our system makes law, it does not deal with an executive agency as if that agency was under its bureaucratic direction. The teaching of *Chadha* makes it clear that the Congress operates only by legislating, not by administering. *See National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 466, 105 S.Ct. 1441, 1451, 84 L.Ed.2d 432 (1985) ("[T]he principal function for the legislature is not to make contracts, but to make laws that establish the policy of the state.").

Just as agencies cannot be thought of as common law agents of the Congress under our constitutional system, they cannot bind Congress as an agent may sometimes bind its principal. The government is always and continuously bound by the legal effects of all previous legislation as well as the Constitution. The very concept of Congress contracting away some of its sovereign power as the *Transohio* court suggests—" We assume without expressing a view that Congress might, in a contract, surrender aspects of its regulatory authority—though the Supreme Court has recently said that a *state* may not contract away 'essential' attribute[s] of its sovereignty,' *United States Trust Co. v. New Jersey*, 431 U.S. 1, 23, 97 S.Ct. 1505, 1518, 52 L.Ed.2d 92 (1977), and long ago suggested that Congress may not either, *see North Am. Commercial Co. v. United States*, 171 U.S. 110, 137, 18 S.Ct. 817, 828, 43 L.Ed. 98 (1898)," *Transohio*

at 621—is so strange precisely because Congress does not act as Congress through contracting. Only in Congress' internal housekeeping does it act by contracting. In this capacity it acts not as one of the branches of the triune sovereign, but as another government agency. Any theory to the contrary diminishes the role of Congress in our government by turning it into a part of the bureaucratic system rather than as the repository of "[a]ll legislative Powers herein granted . . . ." U.S. CONST. art. I, § 1.

E. *Congressional Policy*

In reaching its conclusion that the agreements between the government and the acquiring thrifts constituted nothing more than gambling transactions, the *Transohio* court invoked as support policy statements criticizing the use of supervisory goodwill made by members of Congress and the Administration. *Transohio*, at 619-20. The government has also invoked such policy statements in arguing that the government cannot be bound by these agreements. This court again seeks to make it clear that *policy considerations have no part* in evaluating whether the acquiring thrifts possessed contractual rights which must be honored. As this court noted in *Winstar II*:

> The duty of this court, like any other court, is solely limited to determining the respective rights of the particular parties before it and granting relief to the parties where appropriate. It would be highly improper for this court to consider, as the government seems to suggest it do, the effect of this decision on the government's savings and loan policy. Courts are not established to make policy. Our Constitution, and

the people who established that great document, gave the policy-making powers to the executive and legislative branches.

Winstar II, 25, Cl.Ct. at 550.

IV. *Consolidation and Certification for Interlocutory Appeal*

Winstar was the first of eighteen cases filed to date in the Claims Court which require a determination of the legal impact of FIRREA on the claimed contract rights of acquiring thrifts. In each of the remaining fifteen cases, the court is called upon to consider, as it has done in *Winstar* and again in the present cases, the nature and effect of pre-FIRREA negotiated agreements between acquiring thrifts and the government. Although some of the remaining cases present issues not addressed in *Winstar*, *Statesman* or *Glendale*, the outcome of all the *Winstar*-related cases will be settled in favor of the government if this court has incorrectly ruled in *Winstar*, *Statesman*, and *Glendale* that (1) the Supreme Court's decision in *POSSE* does not affect the binding nature of the agreements entered into between the government and the acquiring thrifts and (2) FIRREA does not constitute a sovereign act within the meaning of the sovereign acts doctrine.

Based on the fact that this court's conclusions on these two legal issues affect eighteen very large and complex cases, this court raised with the parties in *Winstar*, *Statesman*, and *Glendale* at a status conference on May 4, 1992 the possibility that an interlocutory appeal might be the appropriate means by which potentially to prevent the wasting of considerable resources, not only of the court, but of

the parties in those three cases and the remaining fifteen cases before the court. The court suggested that the *Winstar*, *Statesman*, and *Glendale* cases be the cases taken up on appeal because, considered together, they present a number of different factual variations on the legal issues that must ultimately be decided. In regard to the agreements alleged to constitute a contract, *Statesman* involves an express contract which the government has conceded it entered into (at least in regard to capital credit); *Glendale* involves an express contract which the government does not concede it entered into; and *Winstar* involves an implied-in-fact contract. In regard to the effect of FIRREA on the acquiring thrifts, *Glendale* involves a thrift which, even after FIRREA, is solvent and in operation; *Statesman* involves an insolvent thrift that, but for FIRREA, would be solvent; and *Winstar* involves an insolvent thrift which would still most likely be insolvent even if FIRREA had not been enacted. Further, these are the only three cases which have reached the stage of a final determination of liability.

After resolving the liability stages of *Statesman* and *Glendale* today, the court finds that it is appropriate, and indeed the court's duty, to make it possible for the parties in *Winstar*, *Statesman*, and *Glendale* to seek an interlocutory appeal before the *United States Court* of Appeals for the Federal Circuit. To that end, the court hereby orders:

(1) *Statesman* and *Glendale* are consolidated with *Winstar Corp. v. United States*, No. 90-8C. The cases will be captioned under the case name *Winstar Corp. v. United States*;

(2) Pursuant to 28 U.S.C. § 1292(b), the court hereby certifies that this court's opinions granting summary judgment as to liability in the consolidated cases *Winstar Corp. v. United States*, No. 90-8C, *Statesman Savings Holding Corp. v. United States*, No. 90-773C, and *Glendale Federal Bank, FSB v. United States*, No. 772C, involve controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from these opinions may materially advance the ultimate termination of this and related litigation.

CONCLUSION

For the reasons set forth above, the court grants Statesman's and Glendale's Motions for Summary Judgment as to Liability. The court also denies the government's pending Motions to Dismiss in both cases. If the parties do not seek an interlocutory appeal, these cases will move forward to determine plaintiffs' injury, if any, and the appropriate measure of damages or manner of restitution.

IT IS SO ORDERED.

APPENDIX D

IN THE UNITED STATES CLAIMS COURT

No. 90-8C

WINSTAR CORPORATION AND UNITED FEDERAL SAVINGS BANK, PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

[Filed April 21, 1992]

OPINION

SMITH, Chief Judge.

In its order of February 21, 1992, 25 Cl.Ct. 147, the court granted in part defendant's Motion for Clarification of the Issues Remaining to be Briefed Respecting the Government's Alleged Contract Breach in order to clarify certain outstanding issues in this and related cases. This opinion elaborates upon the court's February 21 order.

FACTS[1]

This case involves Congress' passage of the Financial Institutions Reform, Recovery, and En-

---

[1] The factual background of the case is more fully set forth in the court's opinion of July 27, 1990, *Winstar Corp. v. United States*, 21 Cl.Ct. 112 (1990).

forcement Act of 1989 (FIRREA)[2] and the effect of that Act on plaintiffs' 1984 acquisition of a failing savings and loan institution. Plaintiffs acquired the failing savings and loan, Windom Federal Savings & Loan Association, pursuant to a negotiated agreement with the Federal Home Loan Bank Board (FHLBB) and the Federal Savings and Loan Insurance Corporation (FSLIC). The linchpin of the parties' agreement was the government's assent to allow plaintiffs to employ the purchase method of accounting for the purposes of satisfying regulatory minimum capital requirements. As the court noted in its earlier decision, "the promise of continued treatment of goodwill as a capital asset that could be amortized over 35 years was a negotiated and critical term of this particular transaction. It was critical because it was clear that without it no purchaser would have engaged in this transaction." *Winstar*, 21 Cl.Ct. at 115. Under this purchase method of accounting,

> the book value of the acquired savings and loans' assets and liabilities was adjusted to fair market value at the time of the acquisition. Any excess in the cost of the acquisition (which included liabilities assumed by the acquirer) over the fair market value of the acquired assets was separately recorded on the acquirer's books as "goodwill." In other words, the government agreed to allow the plaintiffs and others in similar circumstances to treat what was a deficit in capital as an asset. Goodwill was considered an intangible asset that could be amortized on a straight-line basis over a number of years. The difference between the aggregate fair market value of the failing thrift's assets was known as "supervisory goodwill," in the context of a supervisory merger, and was recorded on the resulting institution's balance sheet as an asset includable in capital for purposes of satisfying FHLBB's minimum capital requirements.

Id. at 113. The terms of the final agreement accepted by the government provided for a thirty-five year period for the amortization of this supervisory goodwill asset.

The passage of FIRREA in 1989, however, altered the arrangement struck between plaintiffs and the government. The new law provided that supervisory goodwill could be amortized over a period of no more than twenty years, and provided that the amount of goodwill included could not exceed a specified percentage of the savings and loan's assets.[3] Plaintiffs subsequently filed a complaint in this court on January 1, 1990, alleging that the exclusion under FIRREA of at least some of plaintiffs' supervisory

[2] Pub. L. 101-73, 103 Stat. 183 (Aug. 9, 1989). FIRREA is codified at various sections of Title 12 of the United States Code.

[3] The applicable sections of FIRREA provided that certain savings and loan institutions could "include qualifying supervisory goodwill in calculating core capital." 12 U.S.C. § 1464(t)(3)(A) (Supp.1991). "Qualifying supervisory goodwill" was defined by the statute as "supervisory goodwill existing on April 12, 1989, amortized on a straight-line basis over the shorter of—(i) 20 years, or (ii) the remaining period for amortization in effect on April 12, 1989." 12 U.S.C. § 1464(t)(9)(B) (Supp. 1991); *see Winstar*, 21 Cl.Ct. at 114. In plaintiffs' case, the shorter period for allowable amortization was the twenty year period.

goodwill constituted a breach of contract and, alternatively, a taking of plaintiffs' contract rights.[4]

On March 28, 1990, the government filed a Motion to Dismiss or, in the Alternative, for Summary Judgment. In its motion, the government contended that no contractual relationship existed between the parties. Relying primarily on *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 106 S.Ct. 2390, 91 L.Ed.2d 35 (1986) (*POSSE*), the government also argued that plaintiffs' claim, if granted, would have the effect of improperly binding the government's power to regulate. On March 30, 1990, plaintiffs filed a Motion for Summary Judgment as to Liability. After entertaining the arguments proffered by the parties in their briefs and at oral argument, the court ruled on July 27, 1990 that an implied-in-fact contract existed between the parties. *Winstar*, 21 Cl.Ct. at 116-17. The court, however, stopped short of granting plaintiffs' motion for summary judgment, indicating that further briefing would be necessary on the following issues: whether a breach occurred; if so, whether it resulted in injury; and if so, the type and measure of relief appropriate. *Id.* at 117.

In August 1990, the government filed a Motion for Clarification of the Issues Remaining to be Briefed Respecting the Government's Alleged Contract Breach. Following that motion the court heard oral

---

[4] The court does not reach the merits of plaintiffs' taking claim at this juncture. *See Sun Oil Co. v. United States*, 572 F.2d 786, 215 Ct.Cl. 716, 769 (1978) (where a plaintiff presents alternative theories of recovery based on contract and fifth amendment taking rights, recovery on one theory precludes recovery on the other).

argument in a number of other cases on similar and related claims.[5] This opinion and the court's order of February 21, 1992 constitute the court's disposition of the government's Motion for Clarification. As of May 24, 1990, the date of oral argument, plaintiffs' bank had been placed into receivership.

DISCUSSION

I. The existence of a contract

In its Motion for Clarification, the government reiterates its position that, absent an expressed contract right granting plaintiffs an exemption from future legislation regarding the capital treatment of goodwill, plaintiffs' contract breach claim must fail. In support of its position, the government relies on *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 106 S.Ct. 2390, 91 L.Ed.2d 35 (1986) (*POSSE*). In *POSSE*, the state of California and employees of several of its public agencies brought suit against the Secretary of the Department of Health and Human Services to prevent implementation of a 1983 amendment to the Social Security Act. The amendment, if implemented, would revoke states' then-existing "right" to withdraw their participation in the social security system.

---

[5] Oral argument was held on plaintiffs' motions for summary judgment and the government's motions to dismiss in *Statesman Savings Holding Corp. v. United States*, No. 90-773C (February 8, 1991) and *Barron Bancshares, Inc. v. United States*, No. 90-830C (May 30, 1991). Oral argument was held on the government's motions to dismiss in *Glendale Federal Bank, FSB v. United States*, No. 90-772C (February 28, 1991), *Hometown Financial, Inc. v. United States*, No. 90-843C (April 4, 1991), and *Suess v. United States*, No. 90-981C (June 6, 1991).

Since the inception of the social security system in 1935, every state, including California, had voluntarily participated in the program. California, and the other plaintiffs, argued that the original Act under which they and other states had participated had created an independent contractual right to withdraw from the system. This withdrawal right, the plaintiffs contended, constituted a protected property interest under the fifth amendment. This property interest, they asserted, was insulated from the reach of another statutory provision in the original Act granting Congress "the right to alter, amend, or repeal any provision" of the Act, 42 U.S.C. § 1304. In enacting the 1983 amendment cancelling that withdrawal right, the plaintiffs argued, the government had taken plaintiffs' protected property interests in violation of the fifth amendment.[6]

The Supreme Court, however, rejected plaintiffs' claim. Emphasizing the inclusion of the "alter, amend or repeal" power granted in the original Act, the Court held that Congress possessed the power to implement the contested amendment. In so holding, the Court sought to clarify the nature of contractual relationships where the government is a party.

> While the Federal Government, as sovereign, has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights, *see Perry v. United States*, 294 U.S. 330, 350-354 [55 S.Ct. 432, 434-36, 79 L.Ed. 912] (1935); *Lynch v. United States*, 292 U.S. 571 [54 S.Ct. 840, 78 L.Ed. 1434] (1934), we have declined in the

[6] The fifth amendment provides that "nor shall private property be taken for public use without just compensation." U.S. CONST., amendment V.

> context of commercial contracts to find that a "sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in" the contract. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 [102 S.Ct. 894, 907, 71 L.Ed.2d 21] (1982). Rather, we have emphasized that "[w]ithout regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." *Ibid.* Therefore, contractual arrangements, including those to which a sovereign itself is a party, "remain subject to subsequent legislation" by the sovereign. *Id.*, at 147 [102 S.Ct. at 907].

POSSE, 477 U.S. at 52, 106 S.Ct. at 2396-97. Underscoring these tenets of contract interpretation, the Court noted its "often-repeated admonition [ ] that contracts should be construed, if possible, to avoid foreclosing exercise of sovereign authority." *Id.* at 53, 106 S.Ct. at 2397.

Contrary to the assertions of the government, the Court's holding in POSSE in no way precludes this court from finding the existence of a contract between the government and plaintiffs. As is evident from its opinion, the Court in *POSSE* recognized that the government has the power to enter into contracts which confer vested rights—rights which the government has a duty to honor. *See Perry v. United States*, 294 U.S. 330, 351, 55 S.Ct. 432, 435, 79 L.Ed. 912 (1935) ("To say that the Congress may withdraw or ignore [its] pledge, is to assume that the Constitution contemplates a vain promise, a pledge having no other

sanction than the pleasure and convenience of the pledgor. This Court has given no sanction to such a conception of the obligations of our Government."); *Lynch v. United States*, 292 U.S. 571, 580, 54 S.Ct. 840, 844, 78 L.Ed. 1434 (1934) ("Congress was free to reduce gratuities deemed excessive. But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation.").[7]

In *POSSE*, however, unlike the case here, no such vested rights were created as the basic elements of contract formation were absent. In contracts involving the government, as with all contractual relationships, rights vest and contract terms become binding when, after arm's length negotiation, all parties to

[7] The court rejects the government's argument that the *Perry* and *Lynch* decisions are not controlling in this case because the obligation owed by the government in those cases was purely a financial one whereas the obligation owed here is a duty to treat an intangible asset in a certain way. The court does not detect a legally significant distinction between a contract such as the one at issue in *Perry* wherein the government borrowed money from a private party and in return was obligated to pay that money back with interest and a contract like the one at issue here wherein the government asks a private party to engage in a certain activity (*e.g.*, build an airport or purchase an insolvent savings and loan) in exchange for money or some equivalent consideration upon which a fixed value can be placed. In both contractual situations, the legal consideration exchanged can be put in monetary terms and thus damages for breaching the contract can be fixed in monetary terms. Therefore, in this case, as was the case in *Perry* and *Lynch*, the government can be held liable for monetary damages.

the contract agree to exchange real obligations for real benefits.[8] In *POSSE*, the Court determined that such vested contract rights did not exist. *POSSE*, 477 U.S. at 52, 54-55, 106 S.Ct. at 2396, 2397-98. Although the Court did not explicitly so state, the facts of *POSSE* make it clear that the provisions of the original Social Security Act were not promulgated after negotiation, arm's length or otherwise, between Congress and the plaintiffs who filed suit. As is the case with all legislation, the only "negotiations" or bargaining involved in the enactment of the

[8] The validity of all contracts to which the government is a party also depends on a finding that the government representative whose conduct is relied upon possessed actual authority to bind the government. *See El Centro v. United States*, 922 F.2d 816 (Fed.Cir.1990), *cert. denied*,—U.S.—, 111 S.Ct. 2851, 115 L.Ed.2d 1019 (1991). In the instant case, the government concedes that the relevant FHLBB and FSLIC officials possessed such authority. See transcript of oral argument, May 24, 1990, at 86, 94; *see also* 12 U.S.C. § 1729(f) (1989) (FSLIC "is authorized, in its sole discretion and upon such terms and conditions as [it] may prescribe" to extend assistance to failing thrifts).

The sole authority issue raised by the government is whether the relevant FHLBB and FSLIC officials possessed authority to bind Congress from enacting subsequent legislation disrupting the terms of the contract entered into with plaintiffs concerning the capital treatment of supervisory goodwill. *See* Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment at 31-33. The court does not understand this as the true issue raised by this and related cases. The court views this issue as encompassed in defendant's contention that in light of *POSSE* no contract rights exist. The court has been presented with no evidence or argument that FHLBB or FSLIC did not have proper authority in their statutory mandates to engage in the type of or specific transaction involved in this or similar cases.

original Social Security Act and its amendments took place in the halls of Congress. The "rights" at issue in *POSSE*, then, were solely government-created. They were really policy decisions made by the democratic political process. There was no legal consideration for the creation of these "rights." At any time, the government could revoke them *without legal consequence* because the plaintiffs had not bargained for their creation. *See Estate of Samuel E. Bogley v. United States*, 514 F.2d 1027, 206 Ct.Cl. 695, 704-05 (1975) ("It is fundamental that in order to have a valid contract one party must make an offer that is a promise which is conditional upon receipt by the offeror of some act or promise from the offeree, and the offer must be accepted as to all its terms by the offeree."); RESTATEMENT (SECOND) OF CONTRACTS § 71(1) (1981) ("To constitute consideration, a performance or a return promise must be bargained for."); 17 C.J.S. Contracts § 34 (Every contract "is the result of, and springs from, an offer and the acceptance thereof. The offer and acceptance must have the characteristics of a bargain and must be conventional counterparts . . . .").[9]

---

[9] A similar legal issue was presented in *Orrego v. United States Department of Housing and Urban Development (HUD)*, 701 F.Supp. 1384 (N.D.Ill.1988), *rev'd on other grounds sub nom., Orrego v. 833 West Buena Joint Venture*, 943 F.2d 730 (7th Cir.1991). In that case, tenants of a federally assisted moderate and low income apartment building challenged an attempt by the building's private owner to end federal regulation of the apartment. Specifically, the tenants challenged the prepayment by the owner to the Department of Housing and Urban Development (HUD) of the remaining amount due on its federally insured mortgage. The issue in dispute was the nature of the owner's "rights" under the regulatory agreement it entered into with the government. Under the regulatory scheme in effect at the time the owner entered into its agreement, private developers were eligible to "contract" with a government agency which would purchase existing mortgages and give the developers below-market forty-year mortgages on the condition, among others, that they would be limited in the rents they could charge tenants. *See* 12 U.S.C. § 1715l(d)(3). In the standard regulatory agreement at the time the owner in *Orrego* "contracted" with the government, owners were permitted to prepay their mortgages after twenty years. *See* 24 C.F.R. § 221.524(a)(ii). Many owners sought to do this in order to end federal regulation and thereby obtain higher market-fixed rents. *Orrego*, 701 F.Supp. at 1387. However, anticipating a decrease in the availability of low income housing because of the prepayment provision, Congress enacted an amendment to 12 U.S.C. § 1715*l*(d)(3) which eliminated the owners' then-existing "rights" to prepay their mortgages. In *Orrego*, the tenants challenged the owner's post-amendment prepayment, arguing that it was an "illegal" act. *Id.* at 1390. In considering the tenant's claim, the court reviewed the *POSSE* decision and found that the amendment did not unconstitutionally deprive the owner of a vested contractual right as the provision allowing prepayment was " 'simply part of a regulatory program over which Congress retained authority to amend in the exercise of its power to provide for the general welfare.'" *Id.* at 1396-97.

Thus in *Orrego*, as in *POSSE*, the owner did not have a protected property interest because the "rights" it asserted were solely government-created. The "contract" the owner entered into was a standard agreement which existed pursuant to an established regulatory scheme. The purported contract, unlike the one at issue here, was not the result of arms-length negotiation and an exchange of legally binding consideration. The correct analogy to the instant case would be if in *Orrego* the owner had been encouraged by the government to pay off its mortgage and the government had then prohibited it from renting half its apartments!

In addition to the absence of the element of bargaining, there was also no agreement in *POSSE*

between the government and the plaintiffs, implied or otherwise, to exchange real obligations for real benefits. The provision at issue in POSSE permitted voluntary participation of states and state agencies in the social security system. Although the states and their employees paid social security taxes, these were paid in exchange for the right to receive benefits, not in exchange for the ability of the states to withdraw from the system. The California employees paid the same taxes for the same benefits as did all other participants in the social security system. Further, it should be remembered that social security payments are taxes, not insurance premiums voluntarily paid. *Helvering v. Davis*, 301 U.S. 619, 57 S.Ct. 904, 81 L.Ed. 1307 (1937). States thus received a benefit (an opportunity to provide retirement benefits for their citizens) without having to incur a corresponding binding obligation. Any purported contractual relationship existing between the government and the POSSE plaintiffs was therefore invalid for lack of consideration. *See Brannan v. United States*, 7 Cl.Ct. 399, 405 (1985) ("[I]t is basic that consideration is an essential element of any valid contract, whether express or implied in fact."); *see also Lynch*, 292 U.S. at 576, 54 S.Ct. at 842 (finding insurance policies issued by the government to the plaintiffs binding contracts on the basis that the plaintiffs paid consideration, *i.e.* prescribed monthly premiums, to the government); *Estate of Samuel E. Bogley*, 514 F.2d 1027, 206 Ct.Cl. at 704-05 (" '[T]he ingredients of a contract are parties, consent, consideration, and obligation.' ") (quoting *Farrington*

v. Tennessee, 95 U.S. (5 Otto) 679, 24 L.Ed. 558 (1877)).[10]

In contrast, a contractual relationship, with all its attendant obligations and duties, existed between the government and the *Winstar* plaintiffs. All the basic elements of contract formation were present: capacity and mutual intent to contract, arms length negotiation, and the exchange of real obligations for real benefits. *See Winstar*, 21 Cl.Ct. at 114-17.[11] The

---

[10] The Court would also not have found a contractual relationship existing between the government and the state and local employee plaintiffs as participation by employees of entities enrolled in the social security system was effectively mandatory. *See POSSE*, 477 U.S. at 41 n. 11, 106 S.Ct. at 2394 n. 11. An essential element in the formation of a contract, free will of all the parties, was therefore absent as the employee plaintiffs did not willingly negotiate their participation in the system. A decision to invest in or purchase a failing savings and loan has never been made mandatory to this court's knowledge, and was not so here.

[11] The court is not alone in reaching this conclusion. *See, e.g., Far West Fed. Bank v. Director, Office of Thrift Supervision*, 787 F.Supp. 952 (D.Or.1992); *Charter Fed. Sav. Bank v. Director, Office of Thrift Supervision*, 773 F.Supp. 809, 821 (W.D.Va.1991) ("[T]he FHLBB had the discretion to allow or disallow the use of supervisory goodwill over the stipulated time for amortization. The inducement to allow it came, not from the mandate of a regulation, but the FHLBB's need for assistance from plaintiff's institution. This was consideration, and it is one of the essential elements in the parties' legal relationship which characterizes it as contractual in nature."); *Carteret Sav. Bank, FA v. Office of Thrift Supervision*, 762 F.Supp. 1159 (D.N.J.1991); *Hansen Sav. Bank v. Office of Thrift Supervision*, 758 F.Supp. 240 (D.N.J.1991); *Security Sav. & Loan Ass'n v. Director, Office of Thrift Supervision*, 761 F.Supp. 1277 (S.D.Miss.1991); *Far West Fed. Bank v. Director, Office of Thrift Supervision*, 746 F.Supp. 1042 (D.Or.1990); *Security Fed. Sav. Bank v. Director, Office of Thrift Super-*

court's conclusion is buttressed by the fact that the terms of the separate agreements negotiated between each acquiring savings and loan and the FHLBB and FSLIC substantially differ. This is in contrast with the standard agreements at issue in *POSSE* and *Orrego*, where the entities "contracting" with the government had no choice but to accept the terms of a pre-existing regulatory agreement. The fact that the government was a party to this contract, then, has no

---

vision, 747 F.Supp. 656 (N.D.Fla.1990); *Sterling Sav. Ass'n v. Ryan*, 751 F.Supp. 871 (E.D.Wash.1990); *see also Franklin Fed. Sav. Bank v. Director, Office of Thrift Supervision*, 927 F.2d 1332, 1345 (6th Cir.1991) (Contie, J. dissenting) ("The bargained-for (*quid pro quo*) forbearance clearly constitutes an integral component of the negotiated agreement between the FHLBB and [plaintiffs] and was not, as the government suggests, merely a gratuitous forbearance. [Plaintiffs'] shareholders bargained for the instant forbearance and provided the government valuable consideration in reliance upon the government's promise to allow [plaintiffs] the right to amortize supervisory goodwill over a 25-year period."). Authority to the contrary is not definitive on the contract issue. *See Franklin Fed. Sav. Bank v. Director, Office of Thrift Supervision*, 927 F.2d 1332, 1341 (6th Cir.1991) (reversing a district court's granting of a preliminary injunction enjoining the Office of Thrift Supervision from excluding supervisory goodwill, but not deciding whether a binding contract existed between the acquiring savings and loan and the government); *Guaranty Fin. Servs., Inc. v. Ryan*, 928 F.2d 994, 998 (11th Cir.1991) (same); *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, No. 90-1678, 1991 WL 201178 at *7, 1991 U.S.Dist.Col. LEXIS 11877 at *19-20 (denying the grant of a preliminary injunction, but not deciding whether the parties' relationship constituted "a contract or some less binding form of agreement"); *Flagship Fed. Sav. Bank v. Wall*, 748 F.Supp. 742 (S.D.Cal.1990) (denying injunctive relief, but not reaching the contract issue).

bearing on its binding effect. *See Sinking-Fund Cases*, 99 U.S. (9 Otto) 700, 719, 25 L.Ed. 496, 504 (1878) ("The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or municipality or a citizen.").

Approximately forty percent of this court's cases are contract claims involving the federal government. While the government may engage in extremely large and important contractual relationships, it would make all dealings with the government a very elaborate and expensive form of gambling to hold that the government may repudiate a contract whenever subsequent policy considerations dictate that it was not a good or prudent bargain. As James Madison noted exactly two hundred years ago: "Government is instituted to protect property of every sort; as well as that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government which *impartially* secures to every man, whatever is his *own*." JAMES MADISON, *Property* (1792), *reprinted in* 6 THE WRITINGS OF JAMES MADISON 101, 102 (Gaillard Hunt ed., 1906) (emphasis in original).

In finding the existence of a contract in this case the court agrees with the government's assertion, and follows the Supreme Court's holding in *POSSE*, that Congress is free, absent an express and unmistakable intention to the contrary, to enact legislation contravening the terms of prior contractual agree-

ments.[12] Rather, the point the court made in its July 27, 1990 opinion was that when Congress elects to so legislate, the government must still honor the rights of its citizens. *See Winstar*, 21 Cl.Ct. at 116 ("[W]hile Congress' power to regulate is not impaired, the government may be compelled to pay for the results of its actions, especially when in so doing the government actually is paying because it received a benefit."). As discussed more fully below, Congress' decision to regulate in this case had the consequence of exposing the government to potential liability for breach of contract damages or the possibility of having to make restitution to plaintiffs. The assertion that, in order to freely regulate, the government must have the power to disregard the rights and interests of its citizens is a novel proposition that finds no support in the legislative history of FIRREA, or for that matter, in our constitutional tradition. Sovereign power is always restricted, in one sense, by the rights of individuals. However, in our Nation that has never been seen as an improper restriction on regulatory power. Rather, it is the foundation upon which all law and regulation are built. *See Hendler v. United States*, 952 F.2d 1364, 1374 (Fed.Cir.1991) ("In the bundle of rights we call property, one of the most valued is the right to sole and exclusive possession—the right to *exclude* strangers, or for that matter friends, but especially the Government.") (emphasis in original).

---

[12] This principle was recently reaffirmed in *Peterson v. United States Department of Interior*, 899 F.2d 799 (9th Cir.), *cert. denied*, — U.S. —, 111 S.Ct. 567, 112 L.Ed.2d 574 (1990), a case also relied upon by defendant in its Motion for Clarification.

Although *POSSE* and well-developed case law makes it clear that the government is at all times free to legislate, that freedom is inherently constrained by the government's obligation to honor its prior contractual commitments, especially when the government has received a benefit. *See, e.g., Perry*, 294 U.S. at 353-54, 55 S.Ct. at 436 ("The Constitution gives to the Congress the power to borrow money on the credit of the United States, an unqualified power, a power vital to the Government . . . . Having this power to authorize the issue of definite obligations for the payment of money borrowed, the Congress has not been vested with authority to alter or destroy those obligations."). The limits imposed on the government's sovereign power in this case are analogous to the limits imposed on that power by the fifth amendment. Under well-established fifth amendment jurisprudence, the government may legislate in a way that effects, intentionally or otherwise, a "taking" of an individual's private property, whether it be by physically occupying it or rendering it valueless. The fifth amendment, however, circumscribes that governmental power by requiring that the government pay individuals "just compensation" for actions infringing on their protected property interests. *See Hendler*, 952 F.2d at 1378 ("We emphasize that the issue is *not* whether the Government had the right to impose itself and its activities on these plaintiffs. Whatever right the plaintiffs had to be let alone was overcome by the Government's need in the interest of public health and safety . . . . The issue before the court . . . [is] whether, on the facts before it, the Government took any property by permanent physical occupation, thus obligating it to pay plaintiffs just compensation.") (emphasis in original). Thus, the

fifth amendment limits the government's power to take property without precluding its exercise.

In this case, the government's power to regulate must operate within the context of plaintiffs' contract rights. While Congress clearly may alter the regulatory treatment of supervisory goodwill, it must also honor the plaintiffs' rights. The government may breach the contract, but it must pay for the damages the plaintiffs suffer. Any alteration of this principle would undercut our democratic system. It would allow governmental policies to be paid for with a minority's rights.

II. Exemption from future legislation by Congress

In its Motion for Clarification, the government asserts that in order to find the existence of a binding contract right, for which damages can be given, the court must first find that the FHLBB or FSLIC had the authority to grant plaintiffs an unequivocal right to be exempt from future legislation governing the capital treatment of supervisory goodwill. Although the court finds that plaintiffs were *not* granted an exemption from future regulation concerning supervisory goodwill, the court holds that this exemption question is not relevant to the issues before the court. As the court noted in its July 27, 1990 opinion, "plaintiffs are not claiming that the government contractually bound Congress not to change its regulations." *Winstar*, 21 Cl.Ct. at 116. Rather, plaintiffs seek recovery for alleged injuries resulting from Congress' decision to abrogate the government's agreement with plaintiffs. Thus, plaintiffs' claim does not hinge on whether the government granted, or possessed the authority to grant, plaintiffs an

exemption, implied or explicit, from subsequent regulation.

III. Breach of contract

Turning to the question of contract breach, the court finds that in enacting FIRREA the government did in fact breach its contract with plaintiffs. It is undisputed that the original agreement between the parties allowed plaintiffs to treat supervisory goodwill as a capital asset and to amortize it over thirty-five years. It is also undisputed that the government, in enacting FIRREA, altered existing regulations both to reduce the amount of supervisory goodwill includable in calculating core capital and to permit supervisory goodwill to be amortized for no more than twenty years.[12] The effect of FIRREA on plaintiffs was to exclude all but $2.7 million of approximately $9.1 million of supervisory goodwill includable before the enactment of the statute. The court holds that FIRREA's alteration of the terms of the original agreement, absent a countervailing contractual right to do so, constituted a breach of contract entitling plaintiffs to damages or restitution. The government has cited no contractually-based right to alter the terms of the original contract.

---

[12] FIRREA mandates the phasing out of the use of supervisory goodwill in calculating core capital. Prior to January 1, 1992, the amount of supervisory goodwill includable in core capital cannot exceed 1.5% of total assets. Thereafter, the amount of supervisory goodwill includable in core capital declines each year, so as not to exceed 1.0% of total assets through December 31, 1992; not to exceed 0.75% of total assets through December 31, 1993; and not to exceed 0.375% of total assets through December 31, 1994. 12 U.S.C. § 1464(t)(3)(A).

In finding that the government breached its contract with plaintiffs, the court seeks to make it clear that its decision does not reflect, as the government suggests it would, a judgment by the court upon the Congress' savings and loan policy. Clearly, this court is not a policy-making body. The duty of this court, like any other court, is solely limited to determining the respective rights of the particular parties before it and granting relief to the parties where appropriate. It would be highly improper for this court to consider, as the government seems to suggest it do, the effect of this decision on the government's savings and loan policy. Courts are not established to make policy. Our Constitution, and the people who established that great document, gave the policy-making powers to the executive and legislative branches. In a constitutional democracy such as this one, the court must accept as given policies duly enacted into law such as FIRREA was. Likewise, the courts, when adjudicating the rights of citizens, must not be influenced by the amount at stake, whether it be one cent or one billion dollars. It is as wrong to award one cent that is not merited as it is to fail to award a billion dollars that is justly due. To do otherwise would make a mockery of equal justice under law. In establishing this court, Congress gave it a simple mandate: to hear certain monetary claims brought against the government; to determine the government's liability pursuant to those claims, if any; and to fix the amount of damages owed to particular plaintiffs. See 28 U.S.C. § 1491 (1982); S.REP. No. 96-304, 96th Cong., 1st Sess. 11 (1979).

IV. Sovereign acts doctrine

In its Motion for Clarification, the government also argues that the sovereign acts doctrine precludes plaintiffs' recovery for breach of contract.[14] Under that doctrine, the government is not contractually liable, absent an express agreement to the contrary, for the consequences of acts performed in its sovereign capacity. *See generally* Peter S. Latham, *The Sovereign Act Doctrine in the Law of Government Contracts: A Critique and Analysis*, 7 U.TOL.L.REV. 29 (1975). In *Horowitz v. United States*, 267 U.S. 458, 461, 45 S.Ct. 344, 344, 69 L.Ed. 736 (1925), the Supreme Court articulated the doctrine as follows:

> It has long been held by the Court of Claims that the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign. *Deming v. United States*, 1 Ct.Cls. 190, 191; *Jones v. United States*, 1 Ct.Cls. 383, 384; *Wilson v. United States*, 11 Ct.Cls. 513, 520. In the *Jones Case*, *supra*, the court said: "The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other. Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular

[14] The government also asserts this doctrine as a defense to plaintiffs' taking claim.

> contracts into which it enters with private persons . . . ."

(quoting *Jones v. United States*, 1 Ct.Cl. 383, 384 (1865)).

Although the sovereign acts doctrine grants the government immunity from liability on a variety of contractual theories, the doctrine "is not a boundless justification for governmental non-liability." Latham *supra* at 41; *see also American Satellite Co. v. United States*, 20 Cl.Ct. 710, 715 (1990) ("Mere invocation of the sovereign acts doctrine is not a talisman. The doctrine has limitations."). The doctrine grants the government immunity only where the government action alleged to constitute a breach is "public and general" in nature. Typically, government acts have been considered "public and general" when they impose a broad and general effect upon the society or the economy. *See, e.g., Horowitz*, 267 U.S. at 461, 45 S.Ct. at 344 (government found immune from liability where plaintiff's loss was caused by shipping embargo imposed by government on all shipments of silk); *Tony Downs Foods Co. v. United States*, 530 F.2d 367, 209 Ct.Cl. 31, 34 (1976) (immunity found where Executive Order lifting price freeze "on all commodities and services" caused monetary loss to plaintiff); *Amino Bros. Co. v. United States*, 372 F.2d 485, 178 Ct.Cl. 515, 525, *cert. denied*, 389 U.S. 846, 88 S.Ct. 98, 19 L.Ed.2d 112 (1967) (immunity found where government's opening of dam flood gates to run-off water from heavy rains "affected the public generally and was not directed solely toward the plaintiff"); *J.B. McCrary Co. v. United States*, 84 F.Supp. 368, 114 Ct.Cl. 12, 34 (1949) (immunity found where Executive Order freezing labor wages

determined to be "an order of general application affecting all contractors and businesses and laborers everywhere"); *Gothwaite v. United States*, 102 Ct.Cl. 400, 401 (1944) (immunity found where regulations of War Production Board impeding plaintiff's performance affected all entities requiring materials needed for the war effort).[15]

Conversely, where the government abrogates through a limited and focused action specific government obligations to a particular class of individuals or entities it has contracted with, the government is not afforded immunity. In these instances, the government acts not in its capacity as sovereign, but in its capacity as contractor. *See, e.g., Everett Plywood Corp. v. United States*, 651 F.2d 723, 227 Ct.Cl. 415, 429 (1981) ("[T]he act [prohibiting plaintiff from cutting timber it had purchased from the government] was neither public nor general—the government unilaterally terminated one contract after deciding continued performance would have been unwise. It would have been an entirely different case if Congress had passed a law immediately prohibiting all cutting in all public forests, but this unilateral termination does not constitute a sovereign act that

---

[15] In situations where courts have applied the sovereign acts doctrine to government actions only affecting a small class of individuals or entities, *i.e.* where the government action is not literally "general" in application, emphasis has been placed on the compelling "public" nature of the act. *See, e.g., Wah Chang Corp. v. United States*, 282 F.2d 728, 151 Ct.Cl. 41, 51 (1960) (finding that "the temporary taking" of plaintiff's property "for the purpose of facilitating and guarding the secrecy of troop movements in time of war was a 'public and general' act of sovereignty 'performed for the general good' within the meaning of the *Horowitz* doctrine.").

excuses the government from breach damages."); *Sunswick Corp. v. United States*, 75 F.Supp. 221, 109 Ct.Cl. 772, *cert. denied*, 334 U.S. 827, 68 S.Ct. 1337, 92 L.Ed. 1755 (1948) ("It does not follow that the action of the Wage Adjustment Board in directing the plaintiff to increase its carpenters' wages can be so isolated under the guise of an act of sovereignty as to permit the Government, in its capacity as a party to the contract, to disavow having had any part in such action, and to disclaim any liability for whatever increased burden this action may have added to the performance of the contract. The increased wage costs for which plaintiff seeks to be reimbursed resulted not from the Government's public and general act in setting up its wartime system for controlling and adjusting wages, nor from any widespread and general application of a device created for this public purpose as a matter of national policy . . . Thus, the distinction may be seen to rest on which hat the government is wearing when the action abrogating the contract is taken. Is it the government as sovereign or the government as contracting party? In this sense, the application of the doctrine has hinged on the facts of each case.

In order to invoke the sovereign acts doctrine, then, the government bears the burden of showing that its actions "were public, general, sovereign, performed for the public good, and not arbitrary and unreasonable." *American Satellite*, 20 Cl.Ct. at 715 (citing *Air Terminal Servs., Inc. v. United States*, 330 F.2d 974, 165 Ct.Cl. 525, 536 (dissenting opinion of Jones, C.J.), *cert. denied*, 379 U.S. 829, 85 S.Ct. 57, 13 L.Ed.2d 38 (1964)). In this case, the government has not made the requisite showings to invoke the doctrine. The pertinent sections of FIRREA at issue here, 12

U.S.C. §§ 1464(t)(3)(A) and (9)(B), preclude the application of the sovereign acts doctrine.[16] Their very purpose was to take away plaintiffs' rights to use supervisory goodwill because the Congress felt its use was no longer good policy. Courts assessing sovereign act claims have not granted immunity where the sole purpose of the government action is to reverse an earlier policy decision later deemed unwise. *See, e.g., Everett Plywood*, 651 F.2d 723, 227 Ct.Cl. at 429 (government's decision to cancel contract to sell standing timber due to its concern that continued logging and road construction would cause damage to soil, watershed and forest resources found not to be a sovereign act); *Sun Oil Co.*, 572 F.2d 786, 215 Ct.Cl. at 759-68 (government's decision to deny a permit and thereby breach oil drilling lease agreement with plaintiffs because of environmental concerns did not constitute a sovereign act); *Freedman v. United States*, 320 F.2d 359, 162 Ct.Cl. 390 (1963) (government's cancellation of contract to sell surplus tanks because of subsequent discovery of presence in tanks of valuable diesel engines found not to be a sovereign act); *Miller v. United States*, 140 F.Supp. 789, 135 Ct.Cl. 1 (1956) (government's cancellation of contract to sell surplus aircraft because of government's later decision that sales to plaintiff

---

[16] F[illegible] *see Far West Fed. Bank v. Director, Office of Thrift Supervision*, 787 F.Supp. 952, 958-59 (D.Or.1992) (finding FIRREA to be a sovereign act, but ruling that plaintiffs' claim for rescission and restitution based on frustration of purpose is "entirely consistent with the purposes of the sovereign acts doctrine"). Thus the court notes that even if the sovereign acts doctrine did apply to these provisions of FIRREA, plaintiffs might still obtain relief on a theory of frustration of purpose.

would be contrary to national interests found not to be a sovereign act).

In the instant case, taking away plaintiffs' right in these sections of FIRREA was not the necessary means to a broad public end, rather it was the government's end goal. On the government's reasoning, *any* statute breaching a contract would be immune under the doctrine merely because its purpose was to breach the contract. This court has never granted government immunity on such a basis. *See Freedman*, 320 F.2d 359, 162 Ct.Cl. at 402 (the sovereign acts doctrine "does not relieve the government from liability where it has specially undertaken to perform the very act from which it later seeks to be excused . . . . The existence of this court is proof enough that the desire to save money is a poor reason to break an outstanding promise."). Although the court accepts as a given that the government sought to promote the public welfare in enacting FIRREA as a whole, those specific provisions of the Act altering the capital treatment of supervisory goodwill were intended to, and did, impact only upon plaintiffs and those similarly situated entities who had acquired savings and loan institutions. This fact compels the conclusion that sovereign act immunity cannot adhere in this and related cases.

In analyzing the sovereign acts doctrine's applicability to the facts of this case, the court finds it significant that the public purpose the government sought to promote could have been achieved without disturbing plaintiffs' contractual rights. *See Freedman*, 320 F.2d 359, 162 Ct.Cl. at 397-98, 402; *Miller v. United States*, 140 F.Supp. 789, 135 Ct.Cl. at 10-11 (1956); *Weaver Constr. Co.*, 91-2 B.C.A. ¶ 23,800, 1990 WL 39131, 1990 DOT BCA LEXIS 12 at *13

("[T]he Government is not immune from contract damages for an act which implements national policy if the required implementation could have been achieved without disturbing contractual relationships."). The government's suggestion, therefore, that a finding by this court that the sovereign acts doctrine is not applicable would somehow defeat the objectives of Congress in passing FIRREA is without merit. Such a suggestion could only be true if it is assumed that the statute's only cure for the savings and loan industry is taking plaintiffs' newly contributed capital to pay for the alleged excesses of past generations. The statute's comprehensive reform and regulatory system give no support to this view of the role of sections 1464(t)(3)(A) and (9)(B). The question in this case is not whether heightened capital standards for savings and loans is a good policy (the court must and does accept Congress' and the President's decision that it is), rather it is the question whether sections 1464(t)(3)(A) and (9)(B) may force plaintiffs rather than the government to pay for this policy. They may not. As James Madison observed:

> If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property, and the property in rights: they will rival the government that most sacredly guards the former; and by repelling its example in violating the latter, will make themselves a pattern to that and all other governments.

JAMES MADISON, *Property* (1792), *reprinted in* 6 THE WRITINGS OF JAMES MADISON 101, 103 (Gaillard Hunt ed., 1906).

CONCLUSION

For the reasons set forth above, the court finds that a binding contract existed between the government and the plaintiffs and that the government breached that contract when Congress enacted FIRREA. Accordingly, this case will move forward to determine plaintiffs' injury, if any, and the appropriate measure of damages or manner of restitution.

IT IS SO ORDERED.

APPENDIX E

IN THE UNITED STATES CLAIMS COURT

No. 90-8C

WINSTAR CORP., ET AL., PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

[FILED FEBRUARY 21, 1992]

ORDER

To the extent that the court has treated defendant's Motion for Clarification of the Issues Remaining to be Briefed Respecting the Government's Alleged Contract Breach as a motion for reconsideration, that motion is denied. To the extent that this order clarifies defendant's questions, posed in its Motion for Clarification, that motion is granted.

In the next month the court intends to more fully elaborate upon this order with an opinion. However, in order for this litigation, and other related cases to proceed efficiently towards resolution the court provides the parties with the following answers to the questions posed in defendant's Motion for Clarification.

(1) After a further consideration of *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41, 106 S.Ct. 2390, 91 L.Ed.2d 35 (1986) (*POSSE*), and *Peterson v. Department of Interior*, 899 F.2d 799 (9th Cir.), cert. denied, ___ U.S. ___, 111 S.Ct. 567, 112 L.Ed.2d 574 (1990), as well as other case law and briefing in this, and related cases, the court holds that abrogation of plaintiffs' right to treat supervisory goodwill as a capital asset for a period of 35 years breached the government's contract with plaintiffs.

(2) The opinion makes it clear that plaintiffs were not granted an exemption from legislation governing the capital treatment of goodwill. However, the plaintiffs' do have a contract right to certain treatment of their supervisory goodwill as a capital asset. Abrogation of this right by the government absent a countervailing contractual right of the government is a breach of contract entitling the plaintiffs to damages or restitution.

(3) The sovereign acts doctrine does not bar plaintiffs' claims in this or analogous cases.

This order shall be sent to all parties in all *Winstar*-related cases. A status conference in this case and all related cases shall be scheduled for the week of March 23, 1992 to discuss the orderly scheduling of all pending issues to the end that the litigation may proceed to a resolution of remaining issues.

IT IS SO ORDERED.

APPENDIX F

IN THE UNITED STATES CLAIMS COURT

No. 90-8C

WINSTAR CORPORATION & UNITED FEDERAL SAVINGS BANK, PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

[FILED JULY 27, 1990]

OPINION

SMITH, Chief Judge.

This dispute stems from the acquisition of a failing savings and loan prior to the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) and the subsequent effect of the new regulatory scheme on plaintiffs. It presently is before the court on plaintiffs' motion for summary judgment as to liability and defendant's motion to dismiss or in the alternative cross-motion for summary judgment. Although plaintiffs' complaint advances several legal theories, the prerequisite for recovery under any proposed rationale requires the court to find that plaintiffs had a property right stemming from contract or some other

source to include supervisory goodwill as a capital asset for regulatory purposes and to amortize it over 35 years.

After careful consideration of the arguments advanced in the parties' briefs and during extensive oral arguments, the court denies the parties' motions, with leave to renew or move for judgment on the pleadings under RUSCC 12(c), if and when appropriate. The court is of the opinion that summary judgment on liability is precluded because a genuine issue of material fact remains, and requests further briefing in order to resolve this issue.

The court further finds that although there were express agreements among the parties, the transaction as a whole is represented by an implied-in-fact contract. For reasons set forth below, the court reserves its consideration of the taking claim.

FACTS

The facts presented here are intended to provide the reader with a basic understanding of the context in which this dispute arises, and are not intended as a complete factual statement of the case.

Plaintiffs are Winstar Corporation and United Federal Savings Bank, a federal stock savings bank, all of the common stock of which is owned by Winstar. Winstar was formed in 1984 for the sole purpose of acquiring Windom Federal Savings & Loan Association. Windom had shown substantial operating losses in its 1983 year-end report. Faced with the probable need to liquidate Windom, at an alleged cost to the government of over $12 million, the Federal Home Loan Bank Board (FHLBB) actively solicited bids for its acquisition from a list of potential acquirers, among which were the organizers of

Winstar. In late 1983, FHLBB and the Federal Savings and Loan Insurance Corporation (FSLIC) began negotiating with the organizers of Windom. FSLIC eventually recommended to FHLBB that it approve Winstar's merger proposal, based on its analysis of several factors, including the cost to the government of the available alternatives. Winstar's proposal was estimated to be the least costly to the government of all the acquisition proposals, and less than half as expensive as the liquidation of Windom.

Included in Winstar's proposal was the provision that the acquisition employ the purchase method of accounting. Under this method, as described by plaintiffs and not disputed by defendant, the book value of the acquired thrift's assets and liabilities was adjusted to fair market value at the time of the acquisition. Any excess in the cost of the acquisition (which included liabilities assumed by the acquirer) over the fair market value of the acquired assets was separately recorded on the acquirer's books as "goodwill." In other words, the government agreed to allow the plaintiffs and others in similar circumstances to treat what was a deficit in capital as an asset. Goodwill was considered an intangible asset that could be amortized on a straight-line basis over a number of years. The difference between the aggregate fair market value of liabilities assumed by the acquirer and the aggregate fair market value of the failing thrift's assets was known as "supervisory goodwill," in the context of a supervisory merger, and was recorded on the resulting institution's balance sheet as an asset includable in capital for purposes of satisfying FHLBB's minimum capital requirements.

Winstar's initial proposal subsequently was modified, but at all times indicated that the purchase

method of accounting would be used. The proposal ultimately accepted by the government called for a 35-year period for the amortization of this asset. It was anticipated that after such time, at the very latest, the institution really would be in the black. It was hoped that by doing this, with some real infusions of new money and a certain number of years to eliminate this unusual asset, the savings bank could work its way out of the deficit.

In 1989, President Bush signed into law the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub.L. 101-73, 103 Stat. 183 (Aug. 9, 1989) (now codified at various sections of Title 12 of the United States Code). Among the many changes effected by the act are extensive amendments to the Home Owner's Loan Act, codified at 12 U.S.C. §§ 1461-1468, significantly affecting the regulation of the savings and loan industry. The most important provisions for purposes of this case relate to the permissible regulatory treatment of supervisory goodwill.

Under the new law, a certain amount of supervisory goodwill is permitted to be amortized for no more than 20 years. The law restricts on a declining basis the percentage of that goodwill that may be included as capital. The statutory mechanism for this is found in the transition rule that applies to capital standards, at 12 U.S.C. § 1464(t)(3)(A). That section reads as follows:

> Notwithstanding paragraph (9)(A) [defining core capital generally to exclude intangible assets], an eligible savings association may include qualifying supervisory goodwill in calculating core capital. The amount of qualifying supervisory goodwill that may be included may not exceed the applicable percentage of total assets set forth in the following table . . . .

The table indicates that from the date of enactment through December 31, 1994, the percentages decline from 1.500% to 0.375%, after which time no amount will be includable.

"Qualifying supervisory goodwill" is a defined term, the definition of which is found at 12 U.S.C. § 1464(t)(9)(B).

> The term "qualifying supervisory goodwill" means supervisory goodwill existing on April 12, 1989, amortized on a straight-line basis over the shorter of—
>
> (i) 20 years, or
>
> (ii) the remaining period for amortization in effect on April 12, 1989.

Plaintiffs allege that the exclusion under FIRREA of at least some of plaintiffs' supervisory goodwill is in violation of the parties' agreement, and constitutes a breach of contract and, in the alternative, a taking of plaintiffs' contract rights. It also is alleged that as a result of this section, plaintiffs have suffered severe losses.

DISCUSSION

The immediate issue before the court is a garden variety question of whether a contract, express or implied, existed. Although there certainly were express representations made, they combined to create a transaction, which, as a whole, is represented by a contract implied-in-fact.

There is a significant amount of precedent involving the elements required to show an implied-in-fact contract in this court. It has been stated that:

> A contract implied in fact requires a showing of the same intent to contract as that required for an express contract .... It is essential ... that the acceptance of the offer be manifested by conduct that indicates assent to the proposed bargain. The requirements of mutuality of intent and the lack of ambiguity in offer and acceptance are the same for an implied-in-fact contract as for an express contract; only the nature of the evidence differs.

Russell Corp. v. United States, 537 F.2d 474, 210 Ct.Cl. 596, 609 (1976), *cert. denied*, 429 U.S. 1073, 97 S.Ct. 811, 50 L.Ed.2d 791 (1977) (footnotes omitted). *See also Somali Dev. Bank v. United States*, 508 F.2d 817, 205 Ct.Cl. 741, 751 (1974) ("Before a contract may be implied in fact, there must be a meeting of the minds which is inferred from the conduct of the parties, and in the light of the surrounding circumstances, shows their tacit understanding."). Of course, mutual assent is not sufficient to imply a contract. "[T]here must be some consideration moving to the United States, or the Government must have received money under a duty to pay it over, or the claimant must have had a lawful right to the money when it was received, such as money paid under a mistake." *Id.* 508 F.2d 817, 205 Ct.Cl. at 751 (citing *Knote v. United States*, 95 U.S. 149, 156, 24 L.Ed. 442 (1877)).

Defendant vigorously claims that neither FSLIC nor FHLBB agreed that there would be no changes in

regulatory policy with respect to goodwill, nor could they so bind Congress. Plaintiffs assert, with equal vigor, that the government expressed an unequivocal agreement that plaintiffs would be permitted to continue to treat supervisory goodwill as a capital asset and to amortize it for 35 years, regardless of changes in generally accepted accounting principles (GAAP) or in regulatory policy.

The undisputed evidence confirms plaintiffs' position. Among the relevant documents evidencing the parties' intent is the correspondence from the FHLBB to the Board of Directors of United dated July 13, 1984, and referred to in this litigation as the forbearance letter. The first paragraph of the letter indicates that its purpose is "to confirm the understanding that:," and continues to enumerate several terms of the acquisition. Paragraph 2 reads as follows:

> For purposes of reporting to the Board, the value of any intangible assets resulting from accounting for the merger in accordance with the purchase method may be amortized by Savings Bank over a period not to exceed 35 years by the straight-line method; ....

The letter also indicated that the FHLBB recognized that the accounting practices mentioned may have deviated from GAAP: "The accounting forbearances ... are not acceptable in any financial statements which are required to be prepared in accordance with generally accepted accounting principles."

Further evidence of defendant's intent is found in two inter-office memoranda from financial analysts at FHLBB, both of whom were reporting on viability analyses regarding the proposed acquisition. The

first memo, dated March 14, 1984, listed among its "Relevant Assumptions" the following:

> 2. Purchase accounting is applied to the assets of Windom . . . . Goodwill is amortized over 40 years.

The second memo, dated May 30, 1984, similarly listed among its "Relevant Assumptions" that "[g]oodwill is amortized over 35 years." Based on these assumptions, the FHLBB estimated the amount of financial assistance to be provided by FSLIC and the acquirers, respectively. An additional inter-office memorandum from the Deputy Director of Program/Administration of the FHLBB to the Assistant Director of the agency, dated June 1, 1984, indicated the appropriateness of the purchase method of accounting for the proposed transaction, as well as the office's "lack of objection to the accounting forbearance outlined for purposes of reports to the FHLBB."

The documents discussed above are representative of the evidence that leads this court to the firm conclusion that the government expressly intended to contract for the particular treatment of goodwill at issue in this case, notwithstanding changes in GAAP or in the statutory scheme. There is no support for the defendant's argument that these statements merely were representations of the then-existing regulatory policy. Rather, they illustrate the reality that the promise of continued treatment of goodwill as a capital asset that could be amortized over 35 years was a negotiated and critical term of this particular transaction. It was critical because it was clear that without it no purchaser would have engaged in this transaction.

Defendant attempts to mischaracterize plaintiffs' claim as one which improperly seeks to bind the government's power to regulate. To support its motion to dismiss on this ground, defendant cites *Bowen v. Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52, 106 S.Ct. 2390, 2396-97, 91 L.Ed.2d 35 (1986) (*POSSE*) ("contractual arrangements, including those to which a sovereign itself is a party, 'remain subject to subsequent legislation' by the sovereign" (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147, 102 S.Ct. 894, 907, 71 L.Ed.2d 21 (1982))); *St. Louis v. United Railways Co.*, 210 U.S. 266, 273-75, 280, 28 S.Ct. 630, 634, 52 L.Ed. 1054 (1908) (sovereign power to tax retained unless "specifically surrendered in terms which admit of no other reasonable interpretation"); *Vicksburg, Shreveport & Pacific Rail Road Co. v. Dennis*, 116 U.S. 665, 668, 6 S.Ct. 625, 626-27, 29 L.Ed. 770 (1886) (" 'neither the right of taxation, nor any other power of sovereignty, will be held by this court to have been surrendered, unless such surrender has been expressed in terms too plain to be mistaken' "); and *Peterson v. United States Department of Interior*, 899 F.2d 799 (9th Cir.1990) (rejecting claim by water management districts that they had contractual right to continue delivering subsidized water to leaseholds of any size notwithstanding change in statute limiting size of leaseholds to which the water could be delivered). All of these cases, however, recognize that there are contracts to which the government must be bound, particularly when the government has received a benefit. *E.g.*, *POSSE*, 477 U.S. at 52, 106 S.Ct. at 2396-97 (citing *Perry v. United States*, 294 U.S. 330, 350-54, 55 S.Ct. 432, 434-37, 79 L.Ed. 912 (1935)); *Lynch v. United States*,

292 U.S. 571, 586, 54 S.Ct. 840, 846-47, 78 L.Ed. 1434 (1934).

It is critical to this case, and apparently misconstrued by defendant, that plaintiffs are not claiming that the government contractually bound Congress not to change its regulations. Rather, plaintiffs claim that in their particular transaction with the government, it was agreed that they would be permitted to treat supervisory goodwill in a particular way for a fixed number of years. Thus, while Congress' power to regulate is not impaired, the government may be compelled to pay for the results of its actions, especially when in so doing the government actually is paying because it received a benefit. An analogy may be drawn to the corporate world, in which under state law and a corporation's by-laws its board of directors' ability to act for the good of the shareholders may not be limited. Notwithstanding this prohibition, the corporation may be required to pay for its actions, such as firing an officer, although the legitimacy of its action is not questioned. With respect to government actions, an analogous situation may be found in the area of regulatory takings. Although Congress may exercise its police power and regulate extensively, in some cases when it does so it must provide just compensation if the result of the regulation effectively is to condemn a property right. *See, e.g., First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922). *See also Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 145, 98 S.Ct. 2646, 2669-70, 57 L.Ed.2d 631 (1978) (Rehnquist, C.J., dissenting). The fact that the

government was free to change its regulatory scheme is not inconsistent with the possibility that there exists a contract here under which the government may have obligations to the plaintiffs in this case.

Finally, defendant argues that in determining whether there exists a contract the court is required to interpret the transaction in light of the policies underlying the controlling legislation. *See Peterson*, 899 F.2d at 807 (relying on *F.H.A. v. The Darlington, Inc.*, 358 U.S. 84, 87-88, 79 S.Ct. 141, 144, 3 L.Ed.2d 132 (1958)). Accepting this proposition, the court is convinced that at least part of the policy reflected in the prior and current regulatory schemes is a strong desire, if not need, on the part of the government to involve the private sector in rescuing failing savings and loans. This view, coupled with the fact that no other private entity would have entered into an agreement to purchase Windom without an agreement to allow it to continue to treat supervisory goodwill as a capital asset and to amortize it over 35 years (or a comparable alternative to achieve the same result), buttresses plaintiffs' assertions.

In the instant case, there is ample evidence to support the court's finding that a contract implied-in-fact was formed between the organizers of Winstar and the United States. This contract embraced the entire transaction by which Windom was acquired by Winstar and merged into United. This contract includes the various written agreements among all interested parties. Among the critical terms of this contract were the obligations on the part of the government to put approximately $1.95 million directly into United and to contribute an additional several million dollars based on Windom's aggregate negative net worth, a sum that ultimately amounted

to $3,694,499, for a total cash contribution of $5,644,499. Winstar, in turn, was obligated to immediately put $2 million into United. As an additional and critical term of the contract, the government agreed to permit Winstar to treat supervisory goodwill as a capital asset to be amortized over 35 years. It must be stressed that the contract provided that this particular institution would be permitted to continue the treatment of supervisory goodwill as a capital asset that could be amortized over 35 years, and not that the regulations would not change. In consideration, the government received the benefit of relief from its obligations to liquidate Windom or otherwise provide for the depositors of Windom, the value of which, while certainly substantial, remains to be determined.

> The court also finds, contrary to defendant's contention, that this contract is not governed by the Contract Disputes Act because it is not a contract for "the procurement of property, . . . ; services; . . . construction, alterations, repair or maintenance of real property; or, . . . the disposal of personal property." 41 U.S.C. § 602(a) (1988).

Because it is preferable to resolve disputes in such a way as to avoid constitutional considerations, *see, e.g., New York City Transit Authority v. Beazer*, 440 U.S. 568, 582, 99 S.Ct. 1355, 1364, 59 L.Ed.2d 587 (1978); *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105, 65 S.Ct. 152, 154, 89 L.Ed. 101 (1944), and because the resolution of plaintiffs' contract claim may obviate the need to proceed on the taking claim, further consideration of plaintiffs' taking claim is suspended.

CONCLUSION

Defendant's argument that the government could not have been a party to the acquisition because the government never owned Windom belies the actual nature of the relationships among the parties, and the character of the transaction. Far from solely providing the necessary regulatory approval for the acquisition, the government was a necessary party to the occurrence of this transaction. It was a party to the implied-in-fact contract, obligating itself and accepting consideration from plaintiffs.

The court requires further briefing on several elements of plaintiffs' contract claim which are necessary to determine liability, and requests further briefing on: whether a breach occurred; if so, whether it resulted in injury; if so, the type and measure of relief appropriate. A status conference to establish a briefing schedule will be scheduled by subsequent order.

APPENDIX G

STATUTORY PROVISIONS AND REGULATIONS

1. Section 1464(t) of Title 12, U.S.C., provides, in relevant part:

(t) Capital standards

(1) In general

(A) Requirement for standards to be prescribed

The Director shall, by regulation, prescribe and maintain uniformly applicable capital standards for savings associations. Those standards shall include —

(i) a leverage limit;

(ii) a tangible capital requirement; and

(iii) a risk-based capital requirement.

(B) Compliance

A savings association is not in compliance with capital standards for purposes of this subsection unless it complies with all capital standards prescribed under this paragraph.

(C) Stringency

The standards prescribed under this paragraph shall be no less stringent than the

capital standards applicable to national banks.

(D) Deadline for regulations

The Director shall promulgate final regulations under this paragraph not later than 90 days after August 9, 1989, and those regulations shall become effective not later than 120 days after August 9, 1989.

(2) Content of standards

(A) Leverage limit

The leverage limit prescribed under paragraph (1) shall require a savings association to maintain core capital in an amount not less than 3 percent of the savings association's total assets.

(B) Tangible capital requirement

The tangible capital requirement prescribed under paragraph (1) shall require a savings association to maintain tangible capital in an amount not less than 1.5 percent of the savings association's total assets.

(C) Risk-based capital requirement

Notwithstanding paragraph (1)(C), the risk-based capital requirement prescribed under paragraph (1) may deviate from the risk-based capital standards applicable to national banks to reflect interest-rate risk or other risks, but such deviations shall not, in the aggregate, result in materially lower

levels of capital being required of savings associations under the risk-based capital requirement than would be required under the risk-based capital standards applicable to national banks.

(3) Transition rule

(A) Certain qualifying supervisory goodwill included in calculating core capital

Notwithstanding paragraph (9)(A), an eligible savings association may include qualifying supervisory goodwill in calculating core capital. The amount of qualifying supervisory goodwill that may be included may not exceed the applicable percentage of total assets set forth in the following table:

For the following period:	The applicable percentage is:
Prior to January 1, 1992	1.500 percent
January 1, 1992-December 31, 1992	1.000 percent
January 1, 1993-December 31, 1993	0.750 percent
January 1, 1994-December 31, 1994	0.375 percent
Thereafter	0 percent

(B) Eligible savings associations

For purposes of subparagraph (A), a savings association is an eligible savings

association so long as the Director determines that —

(i) the savings association's management is competent;

(ii) the savings association is in substantial compliance with all applicable statutes, regulations, orders, and supervisory agreements and directives; and

(iii) the savings association's management has not engaged in insider dealing, speculative practices, or any other activities that have jeopardized the association's safety and soundness or contributed to impairing the association's capital.

* * * * *

(6) Consequences of failing to comply with capital standards

(A) Prior to January 1, 1991

Prior to January 1, 1991, the Director—

(i) may restrict the asset growth of any savings association not in compliance with capital standards; and

(ii) shall, beginning 60 days following the promulgation of final regulations under this subsection, require any savings association not in compliance with

capital standards to submit a plan under subsection (s)(4)(A) of this section that—

(I) addresses the savings association's need for increased capital;

(II) describes the manner in which the savings association will increase its capital so as to achieve compliance with capital standards;

(III) specifies the types and levels of activities in which the savings association will engage;

(IV) requires any increase in assets to be accompanied by an increase in tangible capital not less in percentage amount than the leverage limit then applicable;

(V) requires any increase in assets to be accompanied by an increase in capital not less in percentage amount than required under the risk-based capital standard then applicable; and

(VI) is acceptable to the Director.

(B) On or after January 1, 1991

On or after January 1, 1991, the Director—

(i) shall prohibit any asset growth by any savings association not in compliance with capital standards, except as provided in subparagraph (C); and

(ii) shall require any savings association not in compliance with capital standards to comply with a capital directive issued by the Director (which may include such restrictions, including restrictions on the payment of dividends and on compensation, as the Director determines to be appropriate).

(C) Limited growth exception

The Director may permit any savings association that is subject to subparagraph (B) to increase its assets in an amount not exceeding the amount of net interest credited to the savings association's deposit liabilities if—

(i) the savings association obtains the Director's prior approval;

(ii) any increase in assets is accompanied by an increase in tangible capital in an amount not less than 6 percent of the increase in assets (or, in the Director's discretion if the leverage limit then applicable is less than 6 percent, in an amount equal to the increase in assets multiplied by the percentage amount of the leverage limit);

(iii) any increase in assets is accompanied by an increase in capital not less in percentage amount than required under the risk-based capital standard then applicable;

(iv) any increase in assets is invested in low-risk assets, such as first mortgage loans secured by 1- to 4-family residences and fully secured consumer loans; and

(v) the savings association's ratio of core capital to total assets is not less than the ratio existing on January 1, 1991.

(D) Additional restrictions in case of excessive risks or rates

The Director may restrict the asset growth of any savings association that the Director determines is taking excessive risks or paying excessive rates for deposits.

(E) Failure to comply with plan, regulation, or order

The Director shall treat as an unsafe and unsound practice any material failure by a savings association to comply with any plan, regulation, or order under this paragraph.

(F) Effect on other regulatory authority

This paragraph does not limit any authority of the Director under other provisions of law.

* * * * *

(9) Definitions

For purposes of this subsection—

(A) Core capital

Unless the Director prescribes a more stringent definition, the term "core capital" means core capital as defined by the Comptroller of the Currency for national banks, less any unidentifiable intangible assets, plus any purchased mortgage servicing rights excluded from the Comptroller's definition of capital but included in calculating the core capital of savings associations pursuant to paragraph (4).

(B) Qualifying supervisory goodwill

The term "qualifying supervisory goodwill" means supervisory goodwill existing on April 12, 1989, amortized on a straightline basis over the shorter of—

(i) 20 years, or

(ii) the remaining period for amortization in effect on April 12, 1989.

(C) Tangible capital

The term "tangible capital" means core capital minus any intangible assets (as intangible assets are defined by the Comptroller of the Currency for national banks).

(D) Total assets

The term "total assets" means total assets (as total assets are defined by the Comptroller of the Currency for national banks) adjusted in the same manner as total assets would be adjusted in determining compliance with the leverage limit applicable to national banks if the savings association were a national bank.

(10) Use of comptroller's definitions

(A) In general

The standards prescribed under paragraph (1) shall include all relevant substantive definitions established by the Comptroller of the Currency for national banks.

(B) Special rule

If the Comptroller of the Currency has not made effective regulations defining core capital or establishing a risk-based capital standard, the Director shall use the definition and standard contained in the Comptroller's most recently published final regulations.

2. Section 567.2 of Title 12 of the Code of Federal Regulations provides:

§ 567.2 **Minimum regulatory capital requirement.**

(a) To meet its regulatory capital requirement a savings association must satisfy each of the following capital standards:

(1) *Risk-based capital requirements.* (i) A savings association's minimum risk-based capital requirement shall be an amount equal to 8% of its risk-weighted assets as measured pursuant to § 567.6(a) of this part.

(ii) A savings association may not use supplementary capital to satisfy this requirement in an amount greater than 100% of its core capital as defined in § 567.5 of this part.

(2) *Leverage ratio requirement.* (i) A savings association's minimum leverage ratio requirement shall be the amount set forth in § 567.8 of this part.

(ii) A savings association must satisfy this requirement with core capital as defined in § 567.5 of this part in an amount not less than 3% of its adjusted total assets.

(3) *Tangible capital requirement.* (i) A savings association's minimum tangible capital requirement shall be the amount set forth in § 567.9 of this part.

(ii) A savings association must satisfy this requirement with tangible capital as defined in § 567.9 of this part in an amount not less than 1.5% of its adjusted total assets.

(b) *Transition period for risk-based capital requirement.* (1) From December 7, 1989 to December 30, 1990, a savings association's minimum risk-based capital requirement for any calendar quarter shall be an amount equal to 80% of the

amount required under paragraph (a)(1) of this section; and

(2) From December 31, 1990 until December 30, 1992, a savings association's minimum risk-based capital requirement for any calendar quarter shall be an amount equal to 90% of the amount required under paragraph (a)(1) of this section.

(c) Savings associations are expected to maintain compliance with all of these standards at all times.

3. Section 567.5 of Tile 12 of the Code of Federal Regulations provides in pertinent part:

§ 567.5 **Components of capital.**

(a) *Core Capital.* (1) The following elements,[1] less the amount of any deductions pursuant to paragraph (a)(2) of this section, comprise a savings association's core capital:

(i) Common stockholders' equity (including retained earnings);

[1] Stock issues where the dividend is reset periodically based on current market conditions and the savings association's current credit rating, including but not limited to, auction rate, money market or remarketable preferred stock, are assigned to supplementary capital, regardless of cumulative or noncumulative characteristics.

(ii) Noncumulative perpetual preferred stock and related surplus;[2]

(iii) Minority interests in the equity accounts of subsidiaries that are fully consolidated;

(iv) Nonwithdrawable accounts and pledged deposits of mutual savings associations (excluding any treasury shares held by the savings association) meeting the criteria of regulations and memoranda of the Office to the extent that such accounts or deposits have no fixed maturity date, cannot be withdrawn at the option of the accountholder, and do not earn interest that carries over to subsequent periods;

(v) The remaining goodwill (FSLIC Capital Contributions) resulting from prior regulatory accounting practices as provided in § 567.1(w)(1) of this part.

(2) *Deductions from core capital:* (i) Intangible assets are deducted from assets for purposes of determining core capital except as provided in paragraph (a)(2)(ii) of this section and § 567.12 of this part.

[2] Stock issued by subsidiaries that may not be counted by the parent savings association on the Thrift Financial Report, likewise shall not be considered in calculating capital. For example, preferred stock issued by a savings association or a subsidiary that is, in effect, collateralized by assets of the savings association or one of its subsidiaries shall not be included in capital. Similarly, common stock with mandatorily redeemable provisions is not includable in core capital.

(ii) Paragraph (a)(2)(i) of this section does not apply to qualifying supervisory goodwill held by an eligible savings association (as defined in s 567.1(h) of this part) to the extent permitted by this paragraph. The amount of qualifying supervisory goodwill may not exceed the applicable percentage of adjusted total assets as calculated for the tangible capital requirement set forth in the following table:

	Percent
Jan. 1, 1993—Dec. 31, 1993	0.750
Jan. 1, 1994—Dec. 31, 1994	0.375
Thereafter	0

(iii) [Reserved]

(iv) Investments, both equity and debt, in subsidiaries that are not includable subsidiaries (including those subsidiaries where the savings association has a minority ownership interest) are deducted from assets and, thus core capital except as provided in paragraphs (a)(v) and (a)(vi) of this section.

(v)(A) If a savings association has any investments (both debt and equity) in one or more subsidiaries engaged as of April 12, 1989 and continuing to be engaged in any activity that would not fall within the scope of activities in which includable subsidiaries may engage, it must deduct such investments from assets and, thus, core capital in accordance with paragraph

(a)(2)(v) of this section. The savings association must first deduct from assets and, thus, core capital the amount by which any investments in such subsidiary(ies) exceed the amount of such investments held by the savings association as of April 12, 1989. Next, the savings association must deduct from assets and, thus, core capital the applicable percentage set forth in paragraph (a)(2)(v)(B) of this section of the lesser of:

(1) The savings association's investments in and extensions of credit to the subsidiary as of April 12, 1989; or

(2) The savings association's investments in and extensions of credit to the subsidiary on the date as of which the savings association's capital is being determined.

(B) For purposes of paragraph (a)(2)(v)(A) of this section, the applicable percentage is as follows:

For the period:	The applicable percentage is:
Prior to July 1, 1990	
July 1, 1990-June 30, 1991	10
July 1, 1991-June 30, 1992	25
July 1, 1992-June 30, 1993	40
July 1, 1993-June 30, 1994	60
Thereafter	100

(C) A savings association that has deducted a portion of its investment in a subsidiary pursuant to paragraph (a)(2)(v)(A) of this section must consolidate the prorated assets of the subsidiary in calculating adjusted total assets for the core capital requirement by multiplying those prorated assets by the following applicable percentage and adding that amount in calculating its adjusted total assets:

For the period:	The applicable percentage is:
Prior to July 1, 1990	100
July 1, 1990-June 30, 1991	90
July 1, 1991-June 30, 1992	75
July 1, 1992-June 30, 1993	60
July 1, 1993-June 30, 1994	40
Thereafter	0

(vi) If a savings association holds a subsidiary (either directly or through a subsidiary) that is itself a domestic depository institution, the Office may, in its sole discretion upon determining that the amount of core capital that would be required would be higher if the assets and liabilities of such subsidiary were consolidated with those of the parent savings association than the amount that would be required if the parent savings association's investment were deducted pursuant to paragraphs (a)(2)(iv) and (a)(2)(v) of this section,

consolidate the assets and liabilities of that subsidiary with those of the parent savings association in calculating the capital adequacy of the parent savings association, regardless of whether the subsidiary would otherwise be an includable subsidiary as defined in s 567.1(l) of this part.

* * * * *

Supreme Court, U.S.
FILED
DEC 21 1995
CLERK

No. 95-865 (3)

In The

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

WINSTAR CORPORATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF WINSTAR CORPORATION AND THE STATESMAN GROUP, INC., ET AL., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES J. COOPER
Counsel of Record

SHAW, PITTMAN, POTTS & TROWBRIDGE
2300 N Street, N.W.
Washington, D. C. 20037
(202) 663-8000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the federal government can deliberately repudiate, without liability, specifically negotiated, unambiguous, and express contractual commitments for which it has received valuable consideration simply by changing the law.

RULE 29.6 STATEMENT

In accordance with Rule 29.6 of the Rules of this Court, respondents are Statesman Savings Holding Corp., American Life and Casualty Insurance Company (ALCIC), the Statesman Group, Inc., and Winstar Corporation.

Statesman Savings Holding Corp. is held by ALCIC and the Statesman Group, Inc. (now known as American Life Group, Inc.) and has no non-wholly owned subsidiaries.

ALCIC owns 98% of Vulcan Life Insurance Co. ALCIC's parent is the American Life Holding Company, which is wholly owned by the American Life Group, Inc.

The Statesman Group, Inc. (now, American Life Group, Inc.) is held by Conseco Capital Partners II, L.P., CIHC, Inc., and Bankers Life Holding Corp. CIHC, Inc., which owns nearly 90% of Bankers Life Holding Corp., is wholly owned by Conseco, Inc. Conseco, Inc. is also the managing general partner of Conseco Capital Partners II, L.P. The Statesman Group, Inc. has no non-wholly owned subsidiaries.

The Winstar Corporation has no parent or non-wholly owned subsidiaries.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	14
CONCLUSION	30

TABLE OF AUTHORITIES

Page

CASES

American Constr. Co. v. Jacksonville, T. & K.W. Ry. Co., 148 U.S. 372 (1893) 29

Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986) 12, 19

Carteret Sav. Bank v. OTS, 963 F.2d 567 (3d Cir. 1982) 20

Charter Fed. Sav. Bank v. OTS, 976 F.2d 203 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1643 (1993) 20

Freedman v. United States, 320 F.2d 359 (Ct. Cl. 1963) 26

Guaranty Fin. Serv., Inc. v. Ryan, 928 F.2d 994 (11th Cir. 1991) 20

Heil v. United States, 273 F. 729 (S.D.N.Y. 1921) ... 14, 23

Hills Materials Co. v. Rice, 982 F.2d 514 (Fed. Cir. 1992) 26

Horowitz v. United States, 267 U.S. 458 (1925) 26

Jefferson Branch Bank v. Skelly, 66 U.S. (1 Black) 436 (1862) 17, 18

Lynch v. United States, 292 U.S. 571 (1934) 16

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 18

Perry v. United States, 294 U.S. 330 (1935) 16

Piqua Branch of the State Bank of Ohio, 57 U.S. (16 How.) 369 (1854) 17, 18

Providence Bank v. Billings, 29 U.S. (4 Pet.) 514 (1830) 17

Sinking-Fund Cases, 99 U.S. 700 (1879) 16

TABLE OF AUTHORITIES – Continued

Page

Transcapital Financial Corporation v. Director, OTS, 44 F.3d 1023 (D.C. Cir. 1995) 23

Transohio Sav. Bank v. Director, OTS, 967 F.2d 598 (D.C. Cir. 1992) 22, 23

United States v. Cheorkee Nation of Oklahoma, 480 U.S. 700 (1987) 18, 19

United States v. Klein, 80 U.S. (1 Wall.) 128 (1871) 16

Virginia Military Inst. v. United States, 113 S. Ct. 2431 (1993) 29

STATUTES

Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 ("FIRREA") 2

OTHER

Housing and Urban Recovery Act of 1982: Hearings Before the Subcommittee on Banking Finance and Urban Affairs, 97 Cong., 2d Sess. 1490, 1501 (Mar. 24, 1982) 4

Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* § 4.18 (7th ed. 1993) 29

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

This case is actually three separate cases, consolidated by the Court of Federal Claims for purposes of an interlocutory appeal of the court's order granting plaintiffs' (respondents here) motions for partial summary judgment as to liability. App. 151a.[1] This brief in opposition to the government's petition for writ of certiorari is filed on behalf of the respondents in two of the consolidated cases – Winstar Corporation ("Winstar") and The Statesman Group, Inc., and its affiliated entities (collectively "Statesman"). Respondent in the third consolidated case, Glendale Federal Bank, FSB, is represented by separate counsel and is filing its own brief in opposition.

STATEMENT OF THE CASE

In upholding the trial court's finding of contract liability against the government, a nine-judge majority of the *en banc* Federal Circuit concluded that "[t]here is nothing extraordinary about the contracts in these cases save for their subject matter and the potential liability to the government." App. 45a. Applying straightforward and venerable principles of contract law, the Federal Circuit concluded, as had the trial court, that in acquiring failed savings and loan institutions ("thrifts"), respondents had "negotiated contracts with the bank regulatory

[1] "App." refers to the appendix to the petition for a writ of certiorari. "Pet." refers to the petition itself. "C.A. App." refers to the appendix filed jointly by the parties in the Federal Circuit.

agencies that allowed them to include supervisory goodwill (and capital credits) as assets for regulatory capital purposes and to amortize that supervisory goodwill over extended periods of time." App. 30a. Winstar and Statesman fulfilled their obligations under their contracts with the government, but the government did not. Because the thrift regulators, acting pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183 (codified in relevant part at 12 U.S.C. § 1464), and its implementing regulations, repudiated their agreements and largely eliminated the bargained-for supervisory goodwill and capital credits from the thrifts' regulatory capital, "Winstar and Statesman were immediately thrown into noncompliance with the new regulatory capital requirements and were seized by federal regulators within approximately six months." *Id.* The government's repudiation of its agreements with respondents was nothing more, nor less, than an old-fashioned breach of contract, and the only thing remarkable about this case are the arguments advanced by the government to avoid its liability for the harm it has caused to respondents.

In its effort to persuade this Court that these consolidated cases, despite their interlocutory nature, warrant this Court's immediate review, the government portrays the thrift regulators – the Federal Savings and Loan Insurance Corporation ("FSLIC") and the Federal Home Loan Bank Board ("Bank Board") – as financially disinterested in the acquisitions, passively providing the necessary "regulatory approval of the Bank Board for the . . . acquisition," Pet. 7, and "permit[ting respondents] to use 'goodwill' to satisfy federal regulatory capital

requirements" until FIRREA finally curtailed such "shadowy" accounting "gimmicks." Pet. 4-5. One would scarcely conclude from a reading of the petition that the thrift regulators' commercial interests as the *insurer* of the deposits of the acquired thrifts were vitally at stake in these transactions; that the regulators aggressively solicited Winstar and Statesman to acquire the insolvent thrifts; that the use of regulatory capital "forbearances" such as supervisory goodwill to facilitate mergers and acquisitions of failed thrifts saved the *regulators*, not the acquirors, huge sums of money; that the regulators had no choice but to aggressively promote the use of supervisory goodwill and capital credits because they lacked the cash that would otherwise have been necessary to facilitate acquisitions of failed thrifts; and that the regulators' transactions with Winstar and Statesman saved the government tens of millions of dollars. Because the government's petition thus casts the transactions giving rise to this case in a false light, a somewhat extended counterstatement of the case is required.

1. The causes and extent of the financial crisis in the thrift industry in the 1980s is amply described by the court of appeals in both the panel majority opinion (App. 57a-61a) and the *en banc* majority opinion (App. 4a-7a). It suffices here to say that by 1983, when Winstar acquired an insolvent thrift from the FSLIC, hundreds of savings and loan institutions had failed and the FSLIC was *in extremis*. Historically, the FSLIC and the Bank Board had "resolved" failed thrifts either by liquidation or by offering enough cash or other tangible financial assistance to induce a healthy institution or investor to acquire the failed thrift. The cost to the FSLIC insurance fund of

facilitating the acquisition of a failed thrift usually ran about 70 percent of the cost of liquidating the thrift.[2] Because of the unprecedented number of thrift failures in the early 1980s, "the FSLIC faced deposit insurance liabilities that threatened to exhaust its insurance fund," App. 5a, and it was forced to offer favorable regulatory capital forbearances instead of cash and other tangible financial assistance to induce healthy institutions and private investors to acquire insolvent thrifts. The primary regulatory capital forbearance offered by the regulators was "supervisory goodwill," which was created under the "purchase method" of accounting for a thrift acquisition, and was measured as the amount by which the cost of the acquired thrift (which included any liabilities assumed by the acquirer) exceeded the fair market value of the acquired assets. As the court of appeals explained:

> The Bank Board and the FSLIC allowed the merged thrifts to count this supervisory goodwill toward the minimum regulatory capital requirements and to amortize this goodwill over periods of up to 40 years. This permitted the healthy thrift to assume the deposit liabilities of the failing thrift and to maintain capital compliance without having to put up large amounts of its own money and *without requiring large amounts of monetary assistance from the government.*

---

[2] *Housing and Urban Recovery Act of 1982: Hearings Before the Subcommittee on Housing and Community Development of the House Committee on Banking Finance, and Urban Affairs*, 97th Cong., 2d Sess. 1490, 1501 (March 24, 1982) (statement of Richard T. Pratt, Chairman, Bank Board) ("Pratt Testimony").

App. 6a (emphasis added). The FSLIC and the Bank Board also permitted some acquirers to count all or a portion of the cash contributed by the FSLIC to the deal as a direct and sometimes *permanent* credit to the acquired thrift's regulatory capital. This regulatory forbearance was called, not surprisingly, a "capital credit."

The FSLIC and the Bank Board thus used supervisory goodwill and capital credits, as the Chairman of the Bank Board testified in 1982, "as a means of conserving FSLIC's insurance fund." Pratt Testimony at 1502. And it worked. By offering regulatory capital forbearances, the FSLIC and the Bank Board "stimulated many acquisitions that would otherwise not have taken place" absent much greater cash contributions by the FSLIC. App. 7a. As a result, the average cost to the FSLIC of facilitating the acquisition of an insolvent thrift was reduced to less than 20 percent of the estimated liquidation cost. Pratt Testimony at 1501.

The point is simply this: offering Statesman and Winstar favorable regulatory capital forbearances to induce their acquisitions of failed thrifts was *the government's idea*. Far from the disinterested regulators portrayed in the government's petition, the FSLIC's commercial and financial interests as a deposit insurer were vitally at stake in these transactions, and it needed to sell the failed thrifts to Statesman and Winstar far more than Statesman and Winstar needed to buy them. The FSLIC and the Bank Board offered supervisory goodwill and capital credits as substitutes for the cash that they did not have, and they aggressively encouraged Statesman and Winstar to accept these regulatory capital forbearances as *consideration*, the *quid pro quo* for assuming

liabilities that far exceeded the assets acquired. And the Statesman and Winstar transactions saved the insurance fund, by the FSLIC's own reckoning, almost $60 million over the cost of liquidating the insolvent institutions. App. 11a-12a.

2. a. After "year-long negotiations between Statesman and FHLBB and FSLIC," App. 109a, Statesman acquired four deeply insolvent thrifts in March 1988. Statesman agreed to invest $21 million in the merged institutions, and the government agreed to make a $60 million capital infusion. App. 110a-111a. Even after these capital infusions had been made, however, the merged institution acquired by Statesman was still insolvent, with a *negative* tangible net worth of almost $9 million. In other words, Statesman invested $21 million in a thrift that not only failed to satisfy, on a tangible capital basis, the government's regulatory capital standards, but was deeply insolvent and thus subject to seizure by the thrift regulators on the very day that they delivered it to its new owners. App. 64a.

Statesman agreed to this seemingly foolish acquisition because it bargained for and received from the government express contractual promises (1) that the supervisory goodwill created by the transaction – a figure ultimately calculated to be $25.8 million – could be reported by the thrift as regulatory capital and amortized over a period of 25 years, and (2) that $26 million of the FSLIC's cash contribution could be recorded as a direct and permanent capital credit to the thrifts' regulatory capital. App. 10a. In return for these regulatory capital forbearances, the FSLIC and the Bank Board received what they believed to be a "permanent" disposition of

four of their most serious problem thrifts at a cost to the insurance fund far lower – $50 million lower – than the cost of liquidation.

Statesman took the government at its word, and fully performed its end of the bargain. Indeed, under Statesman's management the thrift's tangible net worth increased from negative $9 million to just under negative $3 million. Yet, on July 5, 1990, the thrift regulators declared Statesman's thrift to be "in an unsafe and unsound condition to transact business," C.A. App. 1071, despite the plain fact that the thrift was by then far safer and sounder than it was a scant 20 months earlier, when the government turned it over to Statesman. The government seized the much-improved thrift along with Statesman's $21 million.

The government changed its mind about the soundness of the thrift's financial condition because it changed its mind about allowing the thrift to report its bargained-for supervisory goodwill and capital credit as regulatory capital. Pursuant to FIRREA, the Bank Board's successor agency, the Office of Thrift Supervision ("OTS"), promulgated new minimum capital standards that largely eliminated the thrift's ability to report its goodwill and capital credit as regulatory capital – the central *quid pro quo* for Statesman's agreement to acquire the insolvent thrifts on the financial terms negotiated by the parties. If the government had honored its contractual obligations to Statesman, the thrift would have satisfied – with millions of dollars to spare – all three of the new minimum regulatory capital standards established by FIRREA. App.

113a-114a. Thus, as the Court of Federal of Claims concluded, "but for the enactment of FIRREA, Statesman would be operating today." App. 114a.

b. In late 1983 the FSLIC and the Bank Board began soliciting bids for the acquisition of Windom Federal Savings & Loan Association, an insolvent thrift institution whose failure was imminent and whose liquidation would cost the FSLIC an estimated $12 million. App. 184a. Winstar, which was organized by private investors for the sole purpose of acquiring the thrift, submitted the winning bid, which saved the FSLIC more than half the estimated cost of liquidating the thrift. App. 185a. Pursuant to the parties' acquisition agreement, Winstar invested approximately $2.8 million in the thrift, while the FSLIC contributed approximately $5.6 million. App. 194a. Even with these capital contributions, the acquired thrift's tangible net worth was approximately *negative* $6.7 million. Accordingly, the "linchpin of the parties' agreement," as the trial court noted, was the government's express promise that the goodwill resulting from the transaction – slightly over $10.6 million – could be reported as regulatory capital: "[T]he promise of continued treatment of goodwill as a capital asset that could be amortized over 35 years was a negotiated and critical term of this particular transaction. It was critical because it was clear that without it no purchaser would have engaged in this transaction." App. 154a.

Winstar's thrift failed to satisfy FIRREA's new minimum capital standards. In May of 1990, OTS placed the thrift in receivership. App. 14a.

3. Statesman and Winstar filed suit against the United States in the Court of Federal Claims, seeking monetary relief on contractual and constitutional theories. The trial court granted, in separate opinions, both Statesman's and Winstar's motions for summary judgment as to liability. App. 106a-152a (*Statesman*); App. 153a-182a (*Winstar*). The Court held that the government had entered into an express contract with Statesman, and an implied-in-fact contract with Winstar, regarding the regulatory capital treatment of supervisory goodwill (and in *Statesman*, the capital credit), and that the government had breached its contractual obligations. In light of its finding of liability on respondents' contract claims, the court did not reach respondents' claims under the Takings Clause and the Due Process Clause of the Fifth Amendment. The court rejected the government's arguments that the "sovereign acts" doctrine and the "unmistakability" doctrine shielded the government from monetary liability. The court consolidated the *Statesman* and *Winstar* cases with the similar *Glendale* case and certified its decisions for interlocutory appeal to the Federal Circuit.

4. A divided panel of the Federal Circuit reversed the trial court's liability rulings in favor of Statesman and Winstar. App. 53a-103a. The panel decision was vacated, however, when the full court granted respondents' petitions for rehearing *en banc*. App. 105a. The *en banc* Federal Circuit affirmed the trial court's contract liability rulings by a 9-to-2 vote. App. 1a-52a. The court of appeals painstakingly reviewed *de novo* the contract documents governing the transactions and concluded, as the trial court had, that the regulatory capital treatment of supervisory

goodwill (and of Statesman's capital credit) was a specifically bargained for and agreed upon term of the contracts between the parties.

With respect to the Statesman transaction, the court of appeals first noted that the government had conceded that the "Assistance Agreement" executed by the parties contained an express term allowing Statesman to report its $26 million capital credit as regulatory capital. The court of appeals found the government's promise concerning supervisory goodwill specifically described in the resolution issued by the Bank Board in connection with the transaction. The Bank Board's resolution, which also reiterated the government's promise concerning Statesman's $26 million capital credit, expressly provided that in "report[ing] to the Bank Board and the FSLIC, . . . [t]he value of any unidentifiable intangible assets [*i.e.*, goodwill] resulting from accounting for the Acquisition . . . in accordance with the purchase method of accounting may be amortized by [Statesman] over a period not in excess of twenty-five (25) years by the straight line method." App. 25a-26a. The Federal Circuit rejected the government's argument that the Bank Board's resolution did not constitute a contract document, noting that the Assistance Agreement contained an integration clause that expressly incorporated contemporaneous resolutions of the Bank Board. App. 25a. Accordingly, the Federal Circuit concluded that the government was contractually bound to permit Statesman to report its supervisory goodwill and capital credit as regulatory capital on the specified terms.

With respect to the Winstar transaction, the court of appeals found that the government had expressly promised to treat Winstar's supervisory goodwill as regulatory

capital, and thus the court did not need to reach the question whether such a promise could be implied-in-fact. Although the Assistance Agreement did not contain a specific provision relating to supervisory goodwill, it did contain an integration clause specifically incorporating into the parties' contract any "resolutions or letters issued contemporaneously" by the Bank Board. A "forbearance" letter issued by the Bank Board in connection with the transaction specifically "confirm[ed] the understanding" of the parties that

> [f]or purposes of reporting to the Board, the value of any intangible assets resulting from the accounting for the merger in accordance with the purchase method may be amortized by [Winstar] over a period not to exceed 35 years by the straight-line method.

App. 27a-28a.

Having found express contractual commitments by the government concerning the regulatory capital treatment of respondents' supervisory goodwill and capital credit, the Federal Circuit readily and correctly concluded that the government's repudiation of those commitments constituted a breach of its contractual obligations.[3]

---

[3] The court of appeals also rejected the government's claim that its contractual commitments concerning regulatory capital were negated under the so-called "unlawful action" clause of the parties' agreement. The clause provides: "Nothing in this Agreement shall require any unlawful action or inaction by either of the parties hereto." App. 23a. The Federal Circuit, like the trial court (App. 125a-129a), interpreted this clause as protecting against any inadvertent violation of law existing when the contract was entered, rather than supplying "an escape

The Federal Circuit turned next to the government's sweeping claim that respondents' contracts failed to satisfy the requirements of the "unmistakability doctrine." Relying primarily on this Court's decision in *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986) ("*POSSE*"), the government argued that because respondents' contracts did not contain an express provision guaranteeing that the government would continue to honor the regulatory capital forbearances notwithstanding a legislative change such as FIRREA, the contracts should not be construed as unmistakably waiving Congress' sovereign power to legislate. Quoting liberally from the trial court's analysis of the unmistakability doctrine, the Federal Circuit reasoned that the government's argument was based upon the false premise that respondents sought to bind "Congress not to change its regulations." App. 37a. Respondents, however, were not seeking to "enjoin[ ] the thrift regulators from applying the FIRREA requirements to the thrifts." App. 37a. Rather, they sought only monetary relief for the harm that they suffered when FIRREA's requirements *were applied* to them. Thus, the court of appeals concluded that upholding the government's contract liability to respondents would not threaten Congress' sovereign power to legislate: "Congress was always free to deem supervisory goodwill a bad idea and legislate it out of existence. Where that legislation breached the government's prior

---

hatch that allows the federal government to avoid performance of its contractual obligations without penalty by passing a law prohibiting its own performance." App. 23a-24a.

contractual obligations regarding the treatment of supervisory goodwill, however, the government remains liable in money damages for the breach." App. 38a.

With specific reference to this Court's decision in *POSSE*, the Federal Circuit agreed with the trial court that "the unmistakability doctrine . . . controls how contractual rights with the government are *created*, *i.e.*, whether the government has agreed in unmistakable terms to be contractually bound." App. 35a-36a. Because Winstar's and Statesman's contracts granted them, "in the clearest possible terms, the right to certain types of regulatory capital treatment," the requirements of the unmistakability doctrine were satisfied. *Id.*

Finally, the Federal Circuit rejected the government's defense under the "sovereign acts doctrine," which excuses the government from contract liability when its performance is precluded by "a public and general sovereign act." App. 39a. FIRREA's provisions concerning supervisory goodwill did not qualify as "public and general" sovereign acts because they specifically targeted respondents' agreements and similar contracts. FIRREA's provisions restricting the regulatory capital treatment of supervisory goodwill, while no doubt enacted for the public good, "specifically abrogate[d] agreements the government had made at an earlier time when it had suggested and approved the use of such 'gimmicks' to avoid bailing out failing thrifts." App. 43a. Because the government had "plainly sought to render its own performance impossible," the sovereign acts doctrine did not insulate it from damages liability. App. 45a.

Judge Nies and Judge Lourie filed separate dissents. Judge Nies continued to adhere to the views expressed in her majority opinion for the panel. (The other member of the panel majority, Judge Rich, changed his mind on reconsideration and joined the *en banc* majority.) She believed that the majority had erred in failing to distinguish between the "government" and Congress in concluding that the enactment of FIRREA had breached respondents' contracts. App. 47a. Judge Lourie concluded that the sovereign acts doctrine precluded respondents' recovery for breach of contract because FIRREA was "broadly directed to the good of the general public, to the country's financial system, rather than to a specific contract that it disapproved." App. 51a.

REASONS FOR DENYING THE WRIT

The government's complicated and sophisticated arguments cannot obscure the simple and straightforward nature of respondents' claim. Winstar and Statesman were induced by the government's thrift regulators to acquire at great expense deeply insolvent thrifts on the basis of the government's contractual commitment to accord the acquired institutions certain specifically negotiated and clearly expressed regulatory capital forbearances. Respondents fully performed their contractual obligations, but the government did not, causing respondents substantial damage. If it is true, as it always has been, that "in the performance of its voluntary engagements with its citizens [the government] should conform to the same standard of honorable conduct as it exacts of them," *Heil v. United States*, 273 F. 729, 731 (S.D.N.Y. 1921)

(Hand, J.), then the courts below did not err in holding the government liable in damages for its breach. Nothing in this Court's teachings on the unmistakability and sovereign acts doctrines suggests otherwise. This case thus presents no legal issue warranting this Court's review, particularly at this interlocutory stage of the proceedings.

1. a. The government asserts that the Federal Circuit "expressly declined to apply the unmistakability doctrine in this case." Pet. 15. If the court of appeals had applied the unmistakability doctrine, it would have concluded, according to the government, that the specifically negotiated, unambiguous, and express contractual promises concerning respondents' regulatory capital forbearances were not sufficiently unmistakable to bind the government. They were not unmistakable, the government says, because the parties' contracts did not contain language "bargain[ing] away Congress's right to change the law"; that is, the contracts did not "include a promise that the federal government would continue to permit supervisory goodwill and capital credits to be counted as capital for purposes of federal thrift capitalization requirements . . . regardless of any change in the law." Pet. 14, 19.[4]

[4] In its briefing to the Federal Circuit, the government offered more specific insight into its version of the unmistakability doctrine, asserting that it could not be held liable to respondents in the absence of "an unambiguous contract provision stating that [the thrift agency] was guaranteeing a specified form of regulatory treatment for a single thrift, and that the contract would override any attempt by Congress to legislate differently for the thrift industry." Replacement Reply Brief of Defendant-Appellant United States at 9.

One need only state the government's understanding of the unmistakability doctrine to know that it is wrong. Indeed, if the government's version of the unmistakability doctrine is correct, then the many cases in which this Court has enforced contracts against the United States despite subsequent changes in the law must be wrong. For example, in *Perry v. United States*, 294 U.S. 330 (1935), this Court held that a government bond promising the payment of principle and interest in gold was a binding contractual obligation that could not be abrogated by subsequent legislation. Similarly, in *Lynch v. United States*, 292 U.S. 571 (1934), the Court held that war risk insurance policies issued pursuant to statute were contracts that could not be abrogated by subsequent statutes without compensating the beneficiary. In neither case did the government contract at issue contain even a reference, unmistakable or otherwise, to Congress or its sovereign powers, let alone a provision "commit[ting] Congress not to modify the governing statutes." Pet. 21. In both *Perry* and *Lynch* the Court made clear that the government is bound by its express contractual undertakings no less than an individual would be. *See Perry*, 294 U.S. at 352 ("When the United States, with constitutional authority, makes contracts, it . . . incurs responsibilities similar to those of individuals who are parties to such instruments."); *Lynch*, 292 U.S. at 579 ("When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."). *See also Sinking-Fund Cases*, 99 U.S. 700, 719 (1879) ("The United States are as much bound by their contracts as are individuals."); *United States v. Klein*, 80 U.S. (1 Wall.) 128, 144 (1871) ("It

is as much the duty of the government as individuals to fulfill its obligations.")

In truth, the government's notion of contract unmistakability misappropriates the nomenclature of a venerable and sensible rule of construction – that contract rights against the government cannot be implied or presumed, but must be "expressed in terms too plain to be mistaken," *Jefferson Branch Bank v. Skelly*, 66 U.S. (1 Black) 436, 446 (1862) – and attaches it to an extraordinary claim of governmental immunity from liability for any contract breach occasioned by an act of Congress. The origins of the doctrine can be traced back to the early 1800s. In the leading case, *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514 (1830), a bank claimed that its charter from the state created a contract right precluding the state from taxing it. Because the charter did not contain "a promise, either express or implied, not to tax the bank," *id.* at 560, the Court held that such a contractual promise "ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear." *Id.* at 561. Nowhere did the Court suggest that anything more "unmistakable" than an express promise not to tax would be required to bind the government. Indeed, in *Jefferson Branch Bank v. Skelly, supra*, this Court held that a bank's charter did create a contract right exempting the bank from taxation imposed by subsequent statute. The charter provision at issue provided that a certain percentage of the bank's profits were to go to the state "in lieu of all taxes."[5] Certainly this language – though unmistakable in

---

[5] *Piqua Branch of the State Bank of Ohio v. Knoop*, 57 U.S. (16 How.) 369, 378 (1854). The Court's opinion in *Jefferson Branch*

the common sense of the term – does not satisfy the unmistakability rule advanced by the government. Yet this Court construed the charter provision to have contractually bound the state "in terms too plain to be mistaken." *Jefferson Branch Bank*, 66 U.S. (1 Black) at 446.

These cases are the direct ancestors of the three cases cited by the government in support of its version of the unmistakability doctrine – *POSSE*, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), and *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700 (1987). *Merrion* involved leases granted by the Apache Tribe for the extraction of oil and gas deposits on reservation land. The Tribe later imposed a severance tax on oil and gas production covered by the leases, and the lessees sought to enjoin imposition of the tax on the ground that their leases exempted them from such taxes. The leases, however, were silent on the question of severance taxes. As the Court concluded:

> We could find a waiver of the Tribe's taxing power only if we *inferred it from silence* in the leases. To presume that a sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in a commercial agreement turns the concept of sovereignty on its head. . . .

455 U.S. at 148 (emphasis added).

Quoting the above passage from *Merrion*, the Court in *POSSE* reiterated that a contractual waiver of the government's right to exercise sovereign powers cannot be

---

Bank does not set out the specific charter provision at issue, but it cites to the *Piqua Branch* decision, which does.

inferred from contractual silence on the issue. *POSSE* involved a purported contract between the Department of Health and Human Services ("HHS") and the State of California governing the State's participation in the social security system. The agreement was expressly made subject to the provisions of the Social Security Act, which at the time the agreement was entered permitted states to withdraw from participation in the program. A subsequent amendment to the Act prohibited states from withdrawing from the system. This Court held that neither the Act nor the State's contract obliged the government to permit the State's withdrawal. Because Congress had expressly reserved in the statute the "right to alter, amend, or repeal" any of its provisions, 477 U.S. at 52, the Act itself obviously "created no contractual rights," and because the contract conformed to the Act, it too created no contractual right to withdraw. *Id. POSSE* thus stands for the common sense rule of construction that neither the government nor anyone else is contractually bound in the face of statements that expressly negate any intention to be bound. *POSSE* expressly reaffirmed, however, that "the Federal Government, as sovereign, has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights." *Id.*

Finally, in *United States v. Cherokee Nation*, 480 U.S. 700 (1987), the Tribe claimed that a treaty granting it title to a river bed also conveyed the federal government's navigational servitude, although the treaty was silent on the point. Citing *POSSE*, this Court rejected the claim, stating that such a waiver of "sovereign authority will not

be implied, but instead must be 'surrendered in unmistakable terms.' " *Id.* at 707 (quoting *POSSE*, 477 U.S. at 52).

The consistent teaching of these cases is that an "unmistakable" promise is simply a clearly expressed promise – that is, the opposite of an implied or presumed promise. None of the cases even distantly suggests that in order to bind the government to a clearly expressed promise, it must be coupled with a further promise that Congress will not enact contrary legislation. Thus, while it is certainly true that the courts below expressly declined in this case to apply the government's extreme version of the unmistakability doctrine, they faithfully applied this Court's version of the doctrine.[6]

---

[6] Nor does the Federal Circuit's decision in this case present a conflict in the circuits in analogous cases. In its attempt to create the appearance of such a conflict, the government relies on the Fourth Circuit's decision in *Charter Fed. Sav. Bank v. OTS*, 976 F.2d 203 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1643 (1993), the Eleventh Circuit's decision in *Guaranty Fin. Serv., Inc. v. Ryan*, 928 F.2d 994 (11th Cir. 1991), and the Third Circuit's decision in *Carteret Sav. Bank v. OTS*, 963 F.2d 567 (3d Cir. 1992). Pet. 16-17. In contrast to the Government's portrayal of those cases, however, both *Guaranty* and *Charter* represent straightforward applications of the principles discussed in *POSSE*. In *Guaranty* the government expressly reserved the right to change applicable regulations and apply them to the thrift. 928 F.2d at 999. And the Fourth Circuit in *Charter* expressly distinguished that case from *Winstar* and *Statesman*, noting that *Charter* did not involve a written contract of any kind between the plaintiffs and the government. 976 F.2d at 211 n.12. In *Carteret*, the Third Circuit specifically declined to reach the issue of contract construction. *See* 963 F.2d at 572-73 ("we need not reach the issue whether Carteret had any contract with the government regarding the treatment of goodwill").

b. It is true, as the government states, that nothing in FIRREA "grant[s] FSLIC or the Bank Board the authority to commit Congress not to modify the governing statutes." Pet. 21. It follows, the government says, that even if the thrift regulators had expressly promised to honor respondents' regulatory capital forbearances despite congressional enactment of contrary legislation, "[i]t is doubtful whether any such commitment by regulators . . . could bind the legislative branch of the federal government." Pet. 19. As we have demonstrated above, however, the unmistakability doctrine, properly understood, requires nothing more to bind the government than a clearly expressed contractual promise, not a further commitment that the promise will be honored despite enactment of contrary legislation. Thus, the fact that FIRREA does not contain a provision delegating to the thrift regulators' authority to make such a commitment is quite beside the point.

It is important to note in this regard that respondents have never argued, and the courts below did not hold, that respondents' contracts either bound Congress not to enact contrary regulatory capital requirements or prohibited it from applying any such requirements to respondents. The government nonetheless argues that it cannot

---

That the *POSSE* doctrine precluded relief in cases in which there was no contract to begin with or in which the contract included an express reservation of authority to alter the terms of performance does not mean that it precludes relief here, where the parties' contracts clearly express the government's promise with respect to the regulatory capital forbearances at issue and which contain no similar language of reservation.

be contractually bound to accord a private party particular regulatory treatment, for subsequent legislatures and regulators must be free "to take actions that are in the public interest." Pet. 20, citing *United States Trust Co. v. New Jersey*, 431 U.S. 1, 45 (1977) (Brennan, J., dissenting). Even taking the government's point at face value, however, it is relevant only to the question of what *remedies* are available for the government's breach of a contractual promise. The point does not go to the distinct *liability* questions of whether a contractual promise exists and, if so, whether it has been breached – the only issues presented in these cases. The government's need for regulatory flexibility would be satisfied by a rule holding that a private contractor is not entitled, as a remedial matter, to specific performance of a government promise concerning its regulatory discretion. But the government's need for regulatory flexibility provides no support for a rule of contract "interpretation" denying that a binding contractual promise was made in the first place. In other words, a determination that respondents are not entitled to injunctive relief against FIRREA's restrictions on regulatory capital is quite different from a determination that the government made no regulatory capital promises to respondents in the first place.[7] Under the government's

---

[7] The D.C. Circuit made the same distinction in its two *Transohio* decisions. Specifically, although the first *Transohio* decision had adopted the United States' erroneous view of contract "interpretation" in a case seeking injunctive relief, the second *Transohio* decision determined that that rule would be inapplicable in a Tucker Act action for damages: "The *Transohio* opinion, including the statement that 'Transohio cannot prevail on its takings claim on the merits,' *Transohio Sav. Bank v. Director, OTS*, 967 F.2d 598, 614 (D.C. Cir. 1992), was solely concerned

theory, the regulators themselves could have reneged on their regulatory capital promises – and seized the thrifts – the day after Statesman and Winstar contributed over $23 million to the ailing institutions, because the parties had exchanged no genuinely binding contractual promises. The Federal Circuit aptly answered the government's point: "Congress was always free to deem supervisory goodwill a bad idea and legislate it out of existence. Where the legislation breached the government's contractual obligations regarding the treatment of supervisory goodwill, however, the government remains liable in money damages for the breach." App. 38a.

In any event, there is no doubt that the thrift regulators had ample statutory authority to enter into the contracts at issue here. As the court of appeals noted, the FSLIC has always had express statutory power "[t]o make contracts." App. 39a (quoting 12 U.S.C. § 1725(c)(3)). That nothing more is required is a central premise of the Tucker Act, whose purpose, according to Judge Learned Hand, was "to assume liability for the acts of such of [the government's] agents as had the power in the discharge of their duties to assume or refuse engagements on the faith of which other citizens should rely." *Heil*, 273 F. at 731.

---

with *Appellants' ability to obtain injunctive relief*, as is evident from the opinion's repeated explanations that Transohio 'did not receive from the banking regulators a right that *defeats Congress' power to change the law on goodwill accounting.*' *Id.* at 613; *see id.* at 601, 624. That analysis has no bearing one way or the other on the *merits of Appellants' claim for compensation* in the Federal Court of Claims." *Transcapital Financial Corporation v. Director, OTS*, 44 F.3d 1023, 1025 (D.C. Cir. 1995) (emphasis added).

c. The government concedes in its petition, as it did in the courts below, that Statesman's contract with the government expressly permitted it to report its $26 million capital credit as regulatory capital. Pet. 10, 17-18. With respect to supervisory goodwill, however, the government claims that respondents' contracts were silent. Pet. 18-19. The government does not attempt to explain this inexplicable assertion. As previously discussed, the Federal Circuit, quoting the trial court, concluded that Winstar's and Statesman's contracts provided for regulatory capital treatment of supervisory goodwill "in the clearest possible terms." App. 36a. The Assistance Agreements governing both transactions contained integration clauses that expressly incorporated contemporaneous resolutions and forbearance letters of the Bank Board. App. 25a, 26a. The resolution pertaining to the Statesman transaction expressly provided that in Statesman's "report[s] to the Bank Board and the FSLIC, . . . any unidentifiable intangible assets resulting from accounting for the Acquisition . . . in accordance with the purchase method of accounting may be amortized by [Statesman] over a period not in excess of twenty-five (25) years by the straight line method." App. 25a-26a. Similarly, the Bank Board's forbearance letter in the Winstar transaction contained a virtually identical provision, although it called for an amortization of up to 35 years. *See* App. 28a.

Quite apart from the specific clauses expressly integrating Bank Board resolutions and forbearance letters into the parties' agreement, the Assistance Agreements governing the Winstar and Statesman transactions also included a specific "Accounting Principles" provision, which provided that the accounting for the transaction

would be governed by "any resolution or action of the Bank Board approving or relating to the Acquisition." App. 83a n.13; C.A. App. 849 (Statesman); C.A. App. 84 (Winstar). The "Accounting Principles" provision of the Assistance Agreements also specifically addressed the issue of future regulatory changes, squarely providing that the parties' agreement governed over any conflicting present or *future* "regulations of the Bank Board or the [FSLIC]": "If there is conflict between such regulations and the Bank Board's resolution or action relating to the Acquisition, . . . the Bank Board's resolution or action shall govern. For purposes of this section, the . . . governing regulations shall be those in effect on the Effective Date, *as subsequently changed, amended, clarified or interpreted* by the Bank Board. . . . " *Id.* (emphasis added). As Circuit Judge Newman noted below: "[T]he 'Accounting Principles' clauses in the Winstar and the Statesman agreements reflect the parties' recognition that the accounting principles might in the future be 'subject to clarification, interpretation or amendment,' and provide that '[i]f there is a conflict between such regulations and the Bank Board's resolution or action . . . , the resolution or action shall govern.' " App. 101a. Judge Newman interpreted this provision, correctly, as reflecting the government's express agreement "that in the event of regulatory change, the negotiated forbearances and accounting procedures would govern." App. 102a. Thus, Statesman's and Winstar's contracts in this case satisfy even the government's version of the unmistakability doctrine.

d. In sum, both the Federal Circuit and the Court of Federal Claims, which are especially entrusted with

issues of government contract interpretation and enforcement, concluded from all the evidence that Statesman and Winstar specifically bargained for and received an express government promise to accord regulatory capital treatment to supervisory goodwill and capital credit for the specified periods. This fact-bound issue plainly does not warrant further review by this Court.

2. a. The Federal Circuit and the Court of Federal Claims are exceedingly familiar with the sovereign acts doctrine, and their determination that the doctrine is inapplicable to this case is plainly correct. The central premise of the doctrine is that the federal government, as a contracting party, is entitled to be treated as if it were a private contracting party – no better, no worse. The doctrine excuses the government from contract liability when its performance is "incidentally" impaired by an *unrelated* "public and general sovereign act," such as an embargo. *See Horowitz v. United States*, 267 U.S. 458, 461 (1925). As this Court stated in *Horowitz*, "in this court the United States appears simply as contractors; and they are to be held liable only within the same limits that any other defendant would be in any other court." *Id.* (quoting *Jones v. United States*, 1 Ct. Cl. 383, 384-85 (1865)). It is clear, therefore, that the sovereign acts doctrine does not immunize the government, any more than it would a private contractor, from liability for nonperformance of an *express contractual promise*. "The doctrine of 'public in general' 'sovereign acts,' laid down in *Horowitz* . . . does not relieve the government from liability where it has specially undertaken to perform the very act from which it later seeks to be excused." *Freedman v. United States*, 320 F.2d 359, 366 (Ct. Cl. 1963). *See also Hills Materials Co. v. Rice*, 982 F.2d 514, 516 n.2 (Fed. Cir. 1992).

Here, the government, in return for valuable consideration, expressly agreed that it would accord regulatory capital treatment to respondents' supervisory goodwill and capital credit for the specified periods of time. This promise was a life and death term of the transaction, as both parties fully understood. The government thus assumed the risk that some future sovereign act might impair or prevent its performance of its bargained-for promise.

b. The government disputes the Federal Circuit's conclusion that the relevant provisions of FIRREA were not "public and general" because Congress had "targeted thrifts that had undergone supervisory mergers" and had "plainly sought to render [the government's] own performance impossible." App. 45a. As the Federal Circuit stressed, "the very purpose" of the pertinent provisions of FIRREA "was to take away plaintiffs' rights to use supervisory goodwill because the Congress felt its use was no longer good policy." App. 41a. Noting that FIRREA granted respondents a brief transition period during which they were permitted to use a declining fraction of their bargained-for supervisory goodwill toward satisfying two of FIRREA's three new regulatory capital standards, the government asserts that FIRREA actually "placed respondents in a *better* position than other thrifts" with goodwill on their books. Pet. 24. Because these "transition rules . . . granted respondents a partial exception from more generally applicable restrictions," the government contends that the restrictions themselves were "public and general acts" within the meaning of the sovereign acts doctrine. Pet. 24.

First, this case is not about how much of respondents' bargained-for supervisory goodwill FIRREA permitted respondents to book as regulatory capital; it is about how much FIRREA *excluded* from respondents' regulatory capital. For Winstar and Statesman there was no transition period; their thrifts were seized within a few months of the date on which FIRREA's restrictions on supervisory goodwill became effective. The government will have a hard time convincing Statesman and Winstar that FIRREA placed them in a *better* position than other thrifts. Second, the government's argument is, in any event, a *non sequitur*. The transitional nature of FIRREA's provisions restricting the regulatory capital treatment of supervisory goodwill in no way negates the undeniable fact that the restrictions were *targeted* at *supervisory* goodwill, whose very existence, as Congress well knew, was attributable to acquisition agreements with the government. See App. 43a - 44a.

c. The sovereign acts doctrine is inapplicable to this case for another reason. The purpose of the doctrine, as discussed, is to place the government as contractor in the same shoes as a private contractor. But the contractual promises at issue here – to accord specified regulatory capital treatment to respondents' supervisory goodwill and capital credit – clearly could not have been made by a private party. Only the government could have made such a contractual promise, and only the government could have breached it. Surely the sovereign acts doctrine does not permit the government to escape damages liability for rendering impossible (by changing the law) its own performance of a contractual promise that only it could have made. Excusing a deliberate breach of such a

governmental promise would contradict rather than serve the purpose of the sovereign acts doctrine.

d. Finally, the government does not come to grips with the unconscionably unfair consequences of applying the sovereign acts doctrine in this case. The government, as a direct result of its repudiation of its contractual obligations, seized Statesman's and Winstar's thrifts, along with the substantial cash capital infusions ($21 million and $2.8 million, respectively) that they had made in the thrifts in direct reliance on the government's promises. The government would invoke the sovereign acts doctrine not only to excuse its breach, but also to retain Statesman's and Winstar's money as well. No sovereign acts case, of course, supports such a result.

3. Finally, even if this case presented a certworthy issue, which it does not, review at this interlocutory stage of the proceedings would be premature. *See, e.g., American Constr. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893). *See also Virginia Military Inst. v. United States*, 113 S. Ct. 2431, 2432 (1993) (opinion of Scalia, J.) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."). *See generally* Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* § 4.18 (7th ed. 1993). The government argues that this Court's immediate review is nonetheless warranted because the damages trials in this case and in similar cases pending in the Court of Federal Claims will be "extremely complicated, expensive, and time-consuming . . . because the parties have very different views on this issue and the circumstances of each thrift vary greatly." Pet. 25.

It is the rare case indeed in which the parties do not "differ" with respect to the remedy that is to be awarded. And if avoiding the time and expense of remedial proceedings is sufficient reason to justify this Court's review of an interlocutory order, few interlocutory orders would fail to qualify. The government has thus offered no good reason for this court to deviate from its normal practice of reviewing only final decisions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES J. COOPER
Counsel of Record

SHAW, PITTMAN, POTTS & TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

Supreme Court, U.S.
FILED
DEC 22 1995
CLERK

(4)

No. 95-865

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

WINSTAR CORPORATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF GLENDALE FEDERAL BANK, FSB IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CARTER G. PHILLIPS
RICHARD D. BERNSTEIN
Sidley & Austin
1722 I Street, N.W.
Washington, D.C. 20006
(202) 736-8000

JERRY STOUCK*
JOE G. HOLLINGSWORTH
DONALD W. FOWLER
Spriggs & Hollingsworth
1350 I Street, N.W.
Ninth Floor
Washington, D.C. 20005
(202) 898-5800

Attorneys for Respondent
Glendale Federal Bank, FSB

* Counsel of Record

December 22, 1995

Balmar Legal Publishing Department, Washington, D.C. (202) 682-9800

37 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held, based on its fact-bound review of the pertinent contract documents and other evidence, that the government and Glendale Federal Bank, FSB had contractually agreed in unmistakable terms that Glendale could include as capital a goodwill asset, amortizable over 40 years, that was essential to make Glendale's merger with a failing thrift financially possible for both Glendale and the government, thereby saving the government more than $783 million in thrift liquidation costs?

2. Whether the Court of Appeals correctly held that the FSLIC was empowered to enter into the contract with Glendale based on its then-existing express statutory authority "[t]o make contracts," 12 U.S.C. § 1725(c)(3)(1989) (repealed 1989)?

3. Whether the Court of Appeals correctly held that the government could not avoid monetary liability for breach of its own contract following enactment of a statute that was plainly intended to, and did, render the government's own performance impossible?

RULE 29.6 STATEMENT

Respondent Glendale Federal Bank, FSB has no parent or subsidiary companies (other than wholly owned subsidiaries).

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
STATEMENT	1
REASONS FOR DENYING THE PETITION	11
CONCLUSION	29

TABLE OF AUTHORITIES

CASES: **PAGE**

Amino Bros. Co. v. United States, 372 F.2d 485 (Ct. Cl.), *cert. denied*, 389 U.S. 846 (1967) 24

Bostwick v. United States, 94 U.S. 65 (1877) . . . 23

Bowen v. Public Agencies Opposed to Social Sec. Entrapment, 477 U.S. 41 (1986) 13-14

Carteret Sav. Bank v. OTS, 963 F.2d 567 (3d Cir. 1992) 16, 20, 22

Charter Fed. Sav. Bank v. OTS, 976 F.2d 203 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1643 (1993) 15-16, 26

Education Assistance Corp. v. Cavazos, 902 F.2d 617 (8th Cir.), *cert. denied*, 498 U.S. 896 (1990) 27

Far West Fed. Bank v. Director, OTS, 787 F. Supp. 952 (D. Or. 1992), *appeal docketed sub nom. Trinity Ventures, Ltd. v. FDIC*, Nos. 92-35597, -36535 (9th Cir. July 7, 1992) 20

Freedman v. United States, 320 F.2d 359 (Ct. Cl. 1963) 23-24

Guaranty Fin. Servs., Inc. v. Ryan, 928 F.2d 994 (11th Cir. 1991) 15-16, 26

Hall v. Wisconsin, 103 U.S. 302 (1850) 20

Hills Materials Co. v. Rice, 982 F.2d 514 (Fed. Cir. 1992) 24

Horowitz v. United States, 267 U.S. 458 (1925) . . 21, 23

Hughes Communications Galaxy, Inc. v. United States, 998 F.2d 953 (Fed. Cir. 1993) 27-28

CASES: **PAGE**

Jefferson Branch Bank v. Skelly, 66 U.S. (1 Black) 436 (1862) 17, 20

Lynch v. United States, 292 U.S. 571 (1934) . . . . *passim*

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 14

Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959) 25

Murray v. Charleston, 96 U.S. 432 (1878) 17, 19-20

National R.R. Passenger Corp. v. Atchison, T. & S.F. Ry., 470 U.S. 451 (1985) 19

New Jersey v. Wilson, 11 U.S. (7 Cranch) 164 (1812) 17

North Am. Commercial Co. v. United States, 171 U.S. 110 (1898) 19

O'Melveny & Myers v. FDIC, 114 S. Ct. 2048 (1994) 26

Perry v. United States, 294 U.S. 330 (1935) . . . . *passim*

Piqua State Branch v. Knoop, 57 U.S. (16 How.) 369 (1854) 17

RTC v. FSLIC, 25 F.3d 1493 (10th Cir. 1994) . . . 16, 20, 22

Sunswick Corp. v. United States, 75 F. Supp. 221 (Ct. Cl.), *cert. denied*, 334 U.S. 827 (1948) . . 24

Transcapital Fin. Corp. v. Director, OTS, 44 F.3d 1023 (D.C. Cir. 1995) 20

United States ex rel. Von Hoffman v. City of Quincy, 71 U.S. (4 Wall) 535 (1866) 20

United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) 17, 19

CASES: **PAGE**

United States v. Cherokee Nation, 480 U.S. 700 (1987) 14

United States v. Turecamo of Savannah, Inc., 64 U.S.L.W. 3416 (U.S. December 11, 1995) (No. 95-525) 26

Veix v. Sixth Ward Bldg. & Loan Ass'n, 310 U.S. 32 (1940) 19

W.B. Worthen v. Kavanaugh, 295 U.S. 56 (1935) . 17

Welch v. Cook, 97 U.S. 541 (1879) 19

Western Fuels-Utah, Inc. v. Lujan, 895 F.2d 780 (D.C. Cir.), *cert. denied*, 498 U.S. 812 (1990) 27-28

Wisconsin & M. Ry. v. Powers, 191 U.S. 379 (1903) 19

STATUTES AND REGULATIONS:

Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (codified at 12 U.S.C. § 1464, *et seq.* (1989)) . . . . . *passim*

28 U.S.C. § 2501 (1994) 27

The National Housing Act of 1934, Pub. L. No. 73-479, 48 Stat. 1246 (codified as amended at 12 U.S.C. § 1701, *et seq.* (1989)) 2

12 U.S.C. §§ 1724 *et seq.* (1989) (repealed 1989) . 2

12 U.S.C. § 1725(c)(3) (1989) (repealed 1989) . . 3

12 U.S.C. §§ 1729(b)-(f) (1989) (repealed 1989) . 3

12 C.F.R. § 567.5(a)(2) (1989) 7

12 C.F.R. § 567.9(c) (1989) 7

MISCELLANEOUS: **PAGE**

4 S. Williston, A Treatise on the Law of Contracts § 601 (3d Ed. 1961) 12

Restatement (Second) of Contracts § 235(2) (1981) 10

Savings and Loan Policies in the Late 1970s and 1980s: Hearings Before the House Comm. on Banking, Finance and Urban Affairs, 101st Cong., 2d Sess. 176 (1990) 4-5

No. 95-865

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

WINSTAR CORPORATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

BRIEF OF GLENDALE FEDERAL BANK, FSB IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Glendale Federal Bank, FSB, hereby opposes the petition of the United States for a writ of certiorari to review the decision of the United States Court of Appeals for the Federal Circuit, sitting *en banc*, in this case.

STATEMENT

This case involves nothing more than a routine, fact-based dispute concerning particular government contracts. In the decisions below, first the Court of Federal Claims and then the United States Court of Appeals for the Federal Circuit, in a 9-2 *en banc* decision, found that in 1981 Glendale Federal Bank and the government entered into a contract by which Glendale agreed to assume by merger the government's deposit insurance

liabilities for a failing thrift and the government agreed in return to Glendale's treating as capital, amortized over 40 years, the $734 million in goodwill generated by the transaction. Pet. App. 8a-9a. The courts below found that the United States breached that contract when in 1989, following Glendale's full performance and while retaining more than $783 million in benefits it received from Glendale's performance, the government repudiated its contractual commitment and required Glendale to deduct more than $550 million in remaining goodwill from its capital accounts. *Id.* at 9a, 29a-30a, 119a-120a.

In concluding that the government was answerable in damages or restitution for its breach of contract, the courts below applied straightforward and longstanding principles of contract law. The government's petition sets forth no compelling reason for this Court to involve itself with what is essentially a dispute about matters of contract interpretation. Because the petition makes such extravagant and unfounded claims about the questions presented by the holdings below and gives such a one-sided description of the proceedings, a somewhat longer than customary statement of the case is necessary.

1. The government's petition wholly ignores the most important federal role with respect to this case: that of deposit insurance provider. The National Housing Act of 1934, Pub. L. No. 73-479, 48 Stat. 1246 (codified as amended at 12 U.S.C. § 1701, *et seq.* (1989)) created the Federal Savings and Loan Insurance Corporation ("FSLIC") to insure the deposit accounts of federally-chartered thrifts, upon payment of premiums and other costs. 12 U.S.C. §§ 1724 *et seq.* (1989) (repealed 1989). The Act gave FSLIC broad authority to protect the interests of the insurance fund, including the authority, upon default of an insured thrift, to take over and operate the association, to liquidate it, to merge it with another insured institution, and to take other appropriate actions, including providing financial assistance to the defaulting institution or to another institution to

facilitate a merger. *Id.* §§ 1729(b)-(f).[1] The contract between Glendale and the government arose in, and must be understood in, that context.

2. During the late 1970's and early 1980's, rampant inflation and correspondingly high interest rates caused an unprecedented and accelerating number of thrift institutions to fail. Pet. App. 4a-5a. These failures in turn presented a crisis for FSLIC, whose "deposit insurance liabilities . . . threatened to exhaust its insurance fund." *Id.* at 5a. In response, "[a]s an alternative to liquidating failed thrifts and expending the FSLIC insurance funds," the FSLIC and its operating head, the Federal Home Loan Bank Board ("Bank Board"), "encouraged healthy thrifts to merge with the failing ones." *Id.* Because the failing thrifts were by definition insolvent, "direct assistance and other incentives" from the government were "necessary for the healthy thrifts to maintain their financial well-being after the mergers." *Id.* The options available to the government included cash assistance, which FSLIC had provided to facilitate earlier mergers; however, in light of the large number of failing institutions, the insurance fund could no more afford cash-assisted mergers than it could the cost of paying off the depositors in liquidations. Accordingly, FSLIC opted instead to offer non-cash assistance and incentives. *Id.*

Among the incentives offered by FSLIC and the Bank Board was goodwill, an intangible asset resulting from the use of purchase method accounting in the mergers. *Id.* Under that accounting method, the amount by which the fair value of a failing thrift's liabilities exceeded the value of its assets was first determined. The acquiring thrift then was permitted to book goodwill in that amount as an asset includable in capital, which

---

[1] Among the powers granted FSLIC to carry out its responsibilities, specifically, was the power "[t]o make contracts." 12 U.S.C. § 1725(c)(3).

could be amortized over time.[2] In short, as the Federal Circuit explained, goodwill was a substitute for cash from the federal government; goodwill thus "permitted the healthy thrift to assume the deposit liabilities of the failing thrift and to maintain capital compliance without having to put up large amounts of its own money and *without requiring large amounts of monetary assistance from the government*." *Id.* at 6a (emphasis added).

Use of goodwill allowed FSLIC to avoid having to pay out on its deposit insurance liabilities, thereby saving the government enormous amounts of money. As former Bank Board Chairman Richard Pratt testified to Congress:

> The Bank Board was caught between a rock and a hard place. While it did not have sufficient resources to close all insolvent institutions, at the same time, it had to consolidate the industry, move weaker institutions into stronger hands and do everything possible to minimize losses during the transition period. *Goodwill was an indispensable tool in performing this task.* . . . It facilitated mergers without incurring the inordinant [sic] cash costs associated with liquidating institutions during the most unfavorable cyclical peak in American economic history.

Savings and Loan Policies in the Late 1970s and 1980s: Hearings Before the House Comm. on Banking, Finance and Urban

[2] Purchase method accounting is a generally accepted accounting principle, pursuant to which the excess of the purchase price over the fair value of net assets acquired in a merger is booked as goodwill, an intangible asset that is then amortized over a period of years. Pet. App. 6a. In a FSLIC-assisted acquisition, such as the one at issue in Glendale's case, the "purchase price" paid by the healthy thrift was its assumption of the failing thrift's liabilities. The excess of those liabilities over the failing thrift's assets was thus considered goodwill which the acquiring institution could book as an intangible asset included in capital and amortize. *Id.* In effect, goodwill functioned much like a long-term loan, which the thrift would repay over time by replacing the gradually-amortizing goodwill with cash generated through earnings.

Affairs, 101st Cong., 2d Sess. 176, at 227 (1990) (emphasis added), *quoted in* Pet. App. 7a.

3. In 1981, Glendale was approached about merging with First Federal Savings and Loan Association of Broward County ("Broward"). Pet. App. 8a. Broward then had liabilities that exceeded the fair value of its assets by $734 million, *id.*, and the government projected that Broward soon would fail. Because of its deposit insurance obligations, the government faced a huge impending liability and, unless some alternative was found, expected to incur real cash costs to liquidate Broward of $783 million, by its own estimate. C.A. App. 1802.[3]

Glendale was then (and always had been) both profitable and in comfortable compliance with regulatory capital requirements. Pet. App. 8a. Even so, its own capital of $277 million was inadequate -- by hundreds of millions of dollars -- to absorb Broward's capital deficiency. Glendale, therefore, could not even consider such a merger unless the government provided sufficient consideration to offset Broward's crippling excess liabilities. *See id.* at 22a n.5. In ordinary circumstances, that consideration would have included a significant cash infusion. But the insurance fund was sufficiently depleted that the government could not do so.

As an alternative to a government cash payment, the government's consideration was provided instead by its agreement to purchase method accounting and 40-year amortization for goodwill. Under that approach, Glendale would book goodwill in the amount of $734 million, which would be included in Glendale's capital and amortized over a 40-year period. That asset would thus offset Broward's excess liabilities for a suffi-

[3] In fact, the immediate cash demand would have been much greater. The government projected that liquidating Broward would require an initial cash outlay of $1.8 billion to satisfy deposit insurance claims and that later sales of Broward's loans and other assets would return only about $1 billion of that expenditure. C.A. App. 1643, 1802.

cient period to permit Glendale to fill Broward's capital deficit through earnings.[4]

"After lengthy negotiations over the terms and conditions," *id.* at 8a, Glendale, FSLIC and the Bank Board executed the final contract documents on November 19, 1981. Effective at closing, Glendale booked the $734 million of agreed-upon goodwill to offset Broward's negative net worth of $734 million, *id.* at 9a, and thereafter Glendale began to amortize the goodwill on the schedules agreed upon with FSLIC and the Bank Board, *id.* at 20a-21a.

By this agreement the government was able, without payment of any cash, effectively to transfer its insurance exposure to Broward's $734 million in excess liabilities onto Glendale's books and thereby to avoid the even larger cash cost of liquidating Broward. FSLIC's Director concluded at the time: "I don't think we'll ever see a deal like this one again in terms of its benefit to the FSLIC. . . ." C.A. App. 1643. The Bank Board Chairman concurred: "the solution which FSLIC has found is one which appears to *save the people of the United States . . . approximat[ely] three quarters of a billion dollars*." *Id.* at 1656 (emphasis added).

Following the Broward merger, Glendale fully performed all of its contractual obligations to the government, including assuming Broward's excess liabilities and making additional cash payments to FSLIC of more than $18 million pursuant to unrelated contract terms. *See* Pet. App. 119a n.8. For the first

[4] Under FSLIC's deposit insurance requirements, thrifts were required to maintain minimum capital reserves, expressed as a percentage of assets. *See* Pet. App. 4a. The larger a thrift's capital reserves, the greater the amount of income-earning assets it could hold. For that reason, Glendale's right to treat the Broward merger goodwill as capital was critical both to its compliance with minimum capital requirements and to its ability to acquire and hold a sufficient volume of assets whose earnings would then be used over time to replace the gradually-amortizing goodwill with tangible capital.

eight years following the parties' agreement, the government likewise honored its commitments concerning goodwill and its amortization. Because of that fact, and only because of that fact, Glendale was able to prosper and to nurse Broward's operations back to health.

4. In the late 1980's, the government began to rethink its earlier contract commitments with respect to goodwill, in large part based on the failure and liquidation of a number of merged institutions and on its desire to increase the amount of hard capital that stood between it and potential demands on its deposit insurance fund.[5] The result was the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (codified at 12 U.S.C. § 1464, *et seq.* (1989)) ("FIRREA"), which became law on August 9, 1989. Capital regulations adopted pursuant to FIRREA now required Glendale to "deduct" goodwill that had arisen out of the Broward merger (termed "supervisory goodwill") from its capital accounts. *See* 12 C.F.R. §§ 567.5(a)(2), 567.9(c) (1989). The government thus squarely repudiated the central contractual commitment it had made with respect to goodwill in its agreement with Glendale. Having used the "indispensable tool" of goodwill in 1981 to induce Glendale's agreement to take on Broward's excess liabilities, the government in 1989 repudiated its own promises and deprived Glendale of the contracted-for consideration, while at the same time retaining the $783 million benefit of Glendale's performance.

The government's repudiation required Glendale to deduct from its regulatory capital all of the more than $550 million of remaining, unamortized goodwill promised in its contract with

[5] When a thrift is liquidated, goodwill does not reduce the losses to the government's insurance fund; only cash does. Thus, as the Federal Circuit observed, "the undisputed reason for limiting the use of the supervisory goodwill was precisely the reason the government used it in the first place -- it is a money equivalent, not money." Pet. App. 45a.

the government, forcing Glendale either to replace the lost capital with cash or to reduce dramatically its earning assets, or both, in order to avoid regulatory seizure itself. *See* Pet. App. 119a-120a. Glendale fell out of regulatory capital compliance for the first time in its history and came within weeks of seizure and liquidation. *Id.* at 14a.

After restructuring its operations and divesting billions of dollars of income-producing assets in an effort to return to capital compliance, Glendale narrowly avoided seizure only by raising more than $450 million of private capital (which partially re-filled the capital deficit that the government's contractual breach had created on *Glendale's* books). In the process, the government neatly transferred the cost of resolving the Broward problem from its own insurance fund to Glendale, saving itself more than three-quarters of a billion dollars in 1981 dollars and causing severe -- and continuing -- adverse effects on Glendale's operations and profits.

5. In 1990 Glendale filed suit against the United States in the Court of Federal Claims, seeking damages based on contract and constitutional taking theories. In a 1992 ruling granting Glendale's motion for partial summary judgment on liability, the court held that the government had an "express contract" with Glendale which "called for the use of the purchase method of accounting and the amortization of an intangible supervisory goodwill asset over . . . forty years," *id.* at 119a; that the government had breached the contract, *id.*at 125a-132a; and that "[t]he government, therefore, is liable to Glendale for damages or restitution," *id.* at 132a. The court then consolidated Glendale's case with the *Winstar* and *Statesman* cases and certified its rulings for interlocutory appeal. *Id.* at 151a-152a.

6. A split panel of the Federal Circuit initially reversed; the full court, however, agreed to rehear the case *en banc* and ordered the panel decision vacated and withdrawn. *Id.* at 105a. The Federal Circuit then affirmed the trial court's breach of

contract rulings by a vote of 9-2. After a "*de novo*" review of the contract documents, the Federal Circuit "agree[d]" with the Court of Federal Claims that "the government had an *express contractual obligation* to permit Glendale to count the supervisory goodwill generated [in] its merger with Broward as a capital asset for regulatory purposes" and "to amortize the major portion of that goodwill . . . for a period of 40 years. . . ." *Id.* at 17a (emphasis added). As the Federal Circuit explained, "[i]t is *clear* from the documents that this was the intent of the parties." *Id.* at 22a (emphasis added).[6]

The Federal Circuit found the parties' clear contractual intent confirmed by the financial facts and circumstances leading to the transaction, including the fact that, if the offsetting $734 million of goodwill had not counted as a capital asset, Glendale -- a "healthy, fully capitalized thrift" *before* the Broward merger -- would have had a net worth immediately *following* the merger of *negative* $460 million. *Id.* at 22a n.5. Absent the government's contractual goodwill commitments, then, Glendale "would have been subject to regulatory noncompliance and penalties from the moment" it merged with Broward, thereby "resulting in the losses the FSLIC sought to avoid." *Id.* at 22a. As the Federal Circuit emphasized, "no healthy thrift would consummate a transaction that immediately put it in regulatory noncompliance." *Id.*[7]

---

[6] The Federal Circuit found, as had the trial court, *see* Pet. App. 115a-116a, that the integration clause of Glendale's agreement expressly incorporated "any resolutions or letters issued contemporaneously by the [Bank Board] or the FSLIC," and, thus, all such "contemporaneous documents . . . collectively constituted the 'Agreement' of the parties." *Id.* at 17a, 21a.

[7] The Federal Circuit rejected, as had the Court of Federal Claims, the government's arguments that wording in Glendale's contract expressly reserved to the government the right to impose materially different regulatory capital requirements. Pet. App. 23a-24a. In fact, as the Court of Federal Claims emphasized, Glendale's contract provided expressly that "[n]o subsequent modification or termination of this Agreement shall be binding unless set forth in writing and executed by the parties or their proper

The Federal Circuit also agreed that there was "little question that the application of FIRREA and the regulations thereunder to deny or restrict plaintiffs' contractual rights to use supervisory goodwill with the associated amortization periods . . . was a breach of FSLIC's and the Bank Board's agreement[]" with Glendale. *Id.* at 29a. The court held that once Glendale performed its obligations under the contract, "the government's contractual obligations became effective." *Id.* at 30a. "Failure to perform a contractual duty when it is due is a breach of contract." *Id.* (citing *Restatement (Second) of Contracts* § 235(2) (1981)).

Finally, the Federal Circuit rejected the government's "unmistakability doctrine" and "sovereign acts" arguments, adopting the substance of the analysis of the Court of Federal Claims on each of these points. Pet. App. 31a-45a. The court of appeals reasoned that the government's "sovereign power to legislate" is not at issue in this case because "Congress was always free to deem supervisory goodwill a bad idea and legislate it out of existence." *Id.* at 38a. However, "[w]here that legislation breached the government's prior contractual obligations . . . , the government remains liable in money damages for the breach." *Id.* The Federal Circuit also held that the sovereign acts defense is inapplicable in this case, under well-established precedent, since the "very purpose" of the "pertinent sections of FIRREA at issue here" was "to take away plaintiffs' rights to use supervisory goodwill because Congress felt its use was no longer good policy." *Id.* at 41a.[8]

---

successors." *Id.* at 132a n.10; *see also id.* at 23a ("the contract could not be changed except by mutual consent"). No modification of the government's goodwill commitment was ever entered into.

[8] In dissent Judge Lourie argued that sovereign acts principles precluded Glendale's recovery for breach of contract. Pet. App. 49a. Even Judge Lourie agreed, however, that "the government had a contractual obligation to permit the thrifts to count goodwill as regulatory capital and to accept the particular amortization periods" and that Congress "deni[ed] . . . those contractual rights in its enactment of FIRREA." *Id.* The other dissenter, Judge Nies, likewise agreed that Glendale and the government had agreed on the use of purchase method accounting but concluded that to create enforceable rights that survived legislative change the contract had to have, but did not, a second explicit promise by FSLIC "to pay [damages] if Congress decided to step in and do away with" purchase method accounting. *Id.* at 47a-48a. As explained *infra*, n.12, the government's petition does not advance this "second-promise" theory.

REASONS FOR DENYING THE PETITION

This is, at heart, a straightforward government contract case. It has been correctly analyzed and decided by the Federal Circuit, sitting *en banc*, and before that by the Court of Federal Claims. The petition for a writ of certiorari does not identify any legal issue warranting further review.

1. The United States first asserts that review is warranted to consider whether the "unmistakable terms" requirement for federal government contracts is "applicable in a breach of contract action where the plaintiff seeks money damages but not injunctive relief." Pet. (I). That question, however, is *not* presented in this case. While it is true that Glendale's contract claims seek only monetary relief -- and that fact is important in considering some of the government's arguments -- it is undeniable that both the Court of Federal Claims and the Federal Circuit specifically found that Glendale obtained a clearly expressed and "unmistakable" contract right to use and amortize goodwill in the agreed manner. Accordingly, the government's predicate contention that the Federal Circuit "declined to apply the unmistakability doctrine in this case," *id.* at 15, is simply untrue. The propriety of a refusal to apply the unmistakability rule is, therefore, not properly presented for decision.

a. The government describes the unmistakability doctrine as a rule "pursuant to which contractual promises by the government to exercise its regulatory authority in a certain way will be found only if expressed in unmistakable terms." *Id.* at 11. That rule is *precisely* the standard applied by the courts

below in this case. As the Federal Circuit explained, quoting the trial court, "in . . . the instant cases, there has been little serious dispute that the government granted the acquiring thrifts, *in the clearest possible terms*, the right to certain types of regulatory capital treatment." Pet. App. 36a (emphasis added); *see also id.* at 137a ("FHLBB and FSLIC *unmistakably* contracted with [plaintiffs] regarding the use of supervisory goodwill") (emphasis added)). Thus, contrary to the government's arguments, the Federal Circuit agreed that the government's contractual promise regarding the treatment and amortization of goodwill was "unmistakably" expressed.

In arriving at this conclusion, the Federal Circuit applied basic and long-established contract interpretation principles. It is fundamental in contract law that the intention of the parties controls the meaning of a contract. 4 S. Williston, A Treatise on the Law of Contracts § 601 (3d Ed. 1961) ("cardinal principle"). Moreover, this Court has long held that "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Lynch v. United States*, 292 U.S. 571, 579 (1934); *accord Perry v. United States*, 294 U.S. 330 (1935). As the Federal Circuit recognized, its decision in this case is "consistent with [this] long standing precedent." Pet. App. 46a. Indeed, it emphasized that "[t]here is nothing extraordinary about the contracts in these cases. . . ." *Id.* at 45a. *See also id.* at 187a (case presents "garden variety question of whether a contract . . . existed").

Based on its review of "all of the contemporaneous documents" and "supported by other evidence and by the circumstances surrounding the transaction," *id.* at 21a, 22a, the Federal Circuit concluded (as had the trial court) that the government had expressly agreed in its written contract with Glendale that Glendale could include goodwill in its capital for a specified number of years. The Federal Circuit found it "*clear* from the

documents that this was the *intent* of the parties." *Id.* at 22a (emphasis added). There is simply no reason for this Court to engage in the fact-bound process of determining whether the courts below correctly parsed the particular documents and correctly analyzed the other contract evidence in finding the parties' "unmistakable" intent embodied in their agreements.

b. The Federal Circuit's (and the Court of Federal Claims') application of the unmistakability principle in this case is fully consistent with this Court's precedents, including the three decisions cited by the government. Pet. 14-15. In those cases, this Court rejected contract-based claims against the government because it found that the claimed contract rights did not exist -- in any form, much less in "unmistakable" terms.

In *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41 (1986) ("*POSSE*"), California challenged an amendment to the Social Security Act which revoked the states' then-existing option, reflected in standard-form participation agreements, to withdraw from the federal social security program. In refusing to enjoin the statutory amendment, the Court construed the participation agreements so as not "effectively to forbid Congress to amend a provision of the Social Security Act." *Id.* at 52. The Court in *POSSE* expressly reaffirmed that "the Federal Government, as sovereign, has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights." *Id.* (citing *Perry* and *Lynch*). However, the Court found that the term of the form participation agreements that was legislatively modified contained no indicia of *contract* rights -- it "was not unique to this Agreement; nor was it a term over which the State had any bargaining power or for which the State provided independent consideration." *Id.* at 55. Instead, "the provision simply was part of a regulatory program" which Congress by statute had expressly "retained the authority to amend." *Id.* Thus, *POSSE*

-- in contrast to this case -- simply did not involve any "unmistakable" contract rights.[9]

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), involved the Tribe's imposition of a tax on oil and gas extracted pursuant to certain leases, the terms of which were completely *silent* regarding taxation of the minerals. As the Court observed, "[t]he severance tax, in contrast [to the lease royalties paid for the oil and gas], is petitioners' contribution 'to the general cost of providing governmental services.'" *Id.* at 138. The Court thus held that imposition of the tax contravened no clear or "unmistakable" contract right, since "the absence of a reference to the tax in the leases themselves hardly impairs the Tribe's authority to impose the tax." *Id.* at 147.

Similarly, *United States v. Cherokee Nation*, 480 U.S. 700 (1987), involved construction of a treaty pursuant to which the Tribe claimed that the federal government had conveyed away its navigational servitude. Noting that such an interpretation of the treaty would be "wholly extraordinary" under well-established law concerning the meaning of the federal servitude, the Court also observed that, in a prior case involving the same treaty, the Tribe had *conceded* that "nothing in the conveyance of title . . . conflicts with the power of the Government [concerning] navigation." *Id.* at 706. In those circumstances, the Court's holding that the treaty did not, in fact, convey away the federal servitude also infringed no "unmistakable" contract right of the Tribe.

In contrast to the Court's construction of the various agreements and treaties in *POSSE*, *Merrion* and *Cherokee Nation*, in this case the Federal Circuit concluded from the record evidence

---

[9] *See* Pet. App. 34a ("The 'rights' at issue in *POSSE*, then, were solely government-created. . . . At any time, the government could revoke them *without legal consequence* because the plaintiffs had not bargained for their creation.").

that the government's contract with Glendale did promise, "in the clearest possible terms," the right to include goodwill in capital and to amortize it over the agreed periods. Pet. App. 36a. The Federal Circuit's holding regarding the clarity of the government's "express contractual obligation" to Glendale is completely faithful to the unmistakability principles set forth in this Court's precedents, is fully supported by the contract evidence and warrants no further review here. *Id.* at 17a.

c. Nor is the government correct in its claim that the Federal Circuit's decision reflects some disagreement among the lower courts regarding application of the unmistakability principle in the context of the goodwill/contract litigation. Pet. 16-17. Indeed, it is curious -- and revealing -- that the leading illustration of the claimed "conflict" among the circuits given by the government is *Charter Federal Savings Bank v. OTS*, 976 F.2d 203 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1643 (1993). In that case the Fourth Circuit, after pointedly observing that "our case involves no written expressions of intent to contract nor any written contract between the parties," specifically refused to find that the thrift had *any* contract rights against the government. *Id.* at 211. Most importantly, the *Charter* court *expressly distinguished* the *Glendale*, *Statesman* and *Winstar* cases on precisely this basis. *Id.* at 211 n.11.

Guaranty Financial Services, Inc. v. Ryan, 928 F.2d 994 (11th Cir. 1991), also poses no conflict with the decision below because in that case the Eleventh Circuit rejected contract-based claims on the basis of a particular and dispositive contract provision -- "it being *expressly understood* that subsequent amendments to such regulations may be made and that *such amendments may increase or decrease the Acquiror's obligation under this Agreement*." *Id.* at 999. Thus, the contract in *Guaranty*, far from unmistakably securing the thrift's right to use goodwill, instead "unambiguously" and "unmistakably" "warned Guaranty that the rules might later change to Guar-

anty's detriment." *Id.*[10] *Charter* and *Guaranty* are thus fully consistent with the Federal Circuit's contract interpretation ruling in this case; they simply involved different facts and, consequently, different contract constructions and results.[11]

d. The government is thus doubly wrong to suggest that the Federal Circuit refused to apply the unmistakability doctrine because this is a monetary relief case. *See* Pet. 15-16. The Federal Circuit plainly *did* apply well-established unmistakability principles in construing Glendale's contract and did not even mention the monetary/injunctive relief distinction in the course of its contract interpretation discussion. *See* Pet. App. 17a-22a. Rather, the Federal Circuit addressed that distinction only in the course of rejecting the government's argument that the Court's construction of the contract would somehow contravene the government's "sovereign power to legislate." *Id.* at 37a ("Money damages, in contrast to injunctive relief, present little threat to the government's sovereign powers other than the obvious financial incentive to honor its contracts."). Thus, despite the government's attempt to engineer a conflict on this point, the Federal Circuit's construction of Glendale's contract (like that of the

[10] *Guaranty* illustrates vividly, as the Court of Federal Claims emphasized, that when the government wanted to make its contractual promises to thrifts subject to changes in laws or regulations, it "knew exactly how to [do so] when that was its intent." Pet. App. 129a ("The government in fact negotiated for that right in some cases.").

[11] The Federal Circuit's decision in this case is also fully consistent with both *RTC v. FSLIC*, 25 F.3d 1493 (10th Cir. 1994) and *Carteret Savings Bank v. OTS*, 963 F.2d 567 (3d Cir. 1992). *See* Pet. 17. In *RTC*, the Tenth Circuit concluded that various contemporaneous documents both "create[d] one contract" and were "wholly unambiguous" regarding the agreed treatment and amortization of goodwill; the court therefore affirmed summary judgment for the thrift plaintiffs on their contract claims. 25 F.3d at 1500. In *Carteret*, the Third Circuit specifically declined to reach the issue of contract construction. 963 F.2d at 574; *see also id.* at 573 (noting that "OTS took the position that we need not reach the issue whether Carteret had any contracts with the government regarding the treatment of goodwill").

Court of Federal Claims) is in fact completely faithful to what the government asserts is "this Court's consistent treatment of the unmistakability doctrine as a principle governing contract *interpretation*, not contract *relief*." Pet. 15-16.[12]

2. The government next requests that the Court review "the Federal Circuit's conclusion that the then-existing thrift regulators had the authority to enter into contracts *binding* the government not to apply new statutory capital requirements." Pet. 19 (emphasis added). Here again, the Federal Circuit reached no such conclusion, and indeed Glendale made no such claim, as both courts below emphasized repeatedly. *See, e.g.*, Pet. App. 192a ("plaintiffs are not claiming that the government contractually bound Congress not to change its regulations"); *id.* at 38a ("Congress was always free to deem supervisory goodwill a bad idea and legislate it out of existence."); *id.* at 135a ("Whether an agency has the power to bind Congress is a false issue in all of the *Winstar* cases."). Nevertheless, "while Congress' power to regulate is not impaired, the government may be compelled to pay for the results of its actions, especially when

[12] In the courts below, the government sometimes advanced an "unmistakability-plus" doctrine, claiming that government contract commitments are not enforceable unless the contract, in addition to stating a substantive promise, also expressly and separately forbids a breach of that promise through subsequent legislative or regulatory change. *See* Pet. App. 143a. The government evidently has abandoned that claim, which is not included in any of the "questions presented" in the petition. In any event, the government's second-promise theory would have rendered illusory a wide variety of federal and state government contracts (including government bonds), since it would be at best a very rare case where such a contract would satisfy the two-promise requirement. That theory also would require this Court to overrule *Lynch*, *Perry* and a long line of other decisions upholding government contract rights in the face of subsequent conflicting laws, including *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), *W.B. Worthen v. Kavanaugh*, 295 U.S. 56 (1935), *Murray v. Charleston*, 96 U.S. 432 (1878), *Jefferson Branch Bank v. Skelly*, 66 U.S. (1 Black) 436 (1862), *Piqua State Branch v. Knoop*, 57 U.S. (16 How.) 369 (1854) and *New Jersey v. Wilson*, 11 U.S. (7 Cranch) 164 (1812).

in doing so the government actually is paying because it received a benefit." *Id.* at 37a, 192a.

In challenging this logic -- the validity of which underlies the very existence of the Court of Federal Claims and its Tucker Act jurisdiction, *see* Pet. App. 138a-139a, 172a -- the government acknowledges that the authorizing statutes at the time of Glendale's 1981 merger with Broward specifically conferred upon FSLIC and the Bank Board "the power '[t]o make contracts,' [and] to extend assistance to acquirors of insolvent FSLIC-insured thrifts." Pet. 20-21. It also concedes that these provisions "establish that FSLIC had the authority to enter into assistance agreements." *Id.* at 21.[13] The government contends, however, that these provisions "do not grant FSLIC or the Bank Board the authority to *commit* Congress not to modify the governing statutes." *Id.* (emphasis added). This is a straw man. Glendale *does not claim* that its contract "committed" Congress to "refrain" from doing anything. Indeed, the government already has imposed new capital requirements eliminating the use of supervisory goodwill, and Glendale has complied with those new requirements, albeit at great financial loss. Glendale seeks here only to be compensated for the consequences of the government's refusal to honor its clear and unmistakable contract promise. That claim quite simply does not implicate the "fundamental principles governing the exercise of legislative power" urged upon the Court by the government. *Id.* at 19.

The government's real argument is that government agencies cannot -- at least "absent the most explicit grant of authority

[13] The government's suggestion that FSLIC nevertheless lacked authority to enter into the Glendale agreement because of the statutory provision that assistance could not exceed the cost of liquidation, Pet. 21 n.7, is nonsense. Among other things, it is undisputed that the cost of liquidating Broward would have been *far* in excess of the non-cash assistance the government provided in its agreement with Glendale. Glendale's contract *saved* the government more than three quarters of a billion dollars, by the government's own estimate.

by Congress," and perhaps not even then, *see* Pet. 19 -- enter into contracts that entitle the promisee to monetary relief following legislative or regulatory change. This radical proposition, if accepted, would render illusory *all* existing government contract obligations because no statute conferring contracting authority, such as that involved in this case, ever "explicit[ly] grant[s]" the contracting officials specific power to "bind" Congress. In five years of litigation the government has never cited such a statute, and Glendale has never found one.

There is no reason for the Court to address the government's far-reaching proposition, however, because the government does not (and cannot) cite a single case supporting its position.[14] This Court's precedents, in fact, are directly to the contrary. At least since *Lynch v. United States*, 292 U.S. 571 (1934), the Court has upheld contract claims against the United States in the face of subsequent conflicting laws without even looking for (and, *a fortiori*, without finding) any express statutory authority to "bind" governmental action by contract.[15] Indeed, in *Perry v.*

[14] Not even the two dissenters below suggested that such a requirement exists, and the cases cited by the government certainly do not so hold. A number of those cases involved no contract at all, *e.g.*, *Welch v. Cook*, 97 U.S. 541, 542 (1879); *cf. Wisconsin & M. Ry. v. Powers*, 191 U.S. 379, 386-87 (1903) (finding no contract, but explicitly recognizing that a bargained for exchange *would* bind the state), or no government contract, *e.g.*, *National R.R. Passenger Corp. v. Atchison, T. & S.F. Ry.*, 470 U.S. 451, 465-471 (1985) (contract between private parties); *Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32, 38-40 (1940) (same). Others involved contracts expressly reserving the sovereign's power to impose subsequent laws. *See, e.g.*, *North Am. Commercial Co. v. United States*, 171 U.S. 110, 125 (1898). Still others involved Contract Clause holdings supportive of Glendale's claims. *See, e.g.*, *United States Trust Co. v. New Jersey*, 431 U.S. 1, 24 (1977) ("Whatever the propriety of a State's binding itself to a future course of conduct in other contexts, the power to enter into effective financial contracts cannot be questioned.").

[15] Cases construing the Contract Clause are to the same effect. *See, e.g.*, *United States Trust Co.*, 431 U.S. at 23-24; *Murray v. Charleston*, 96 U.S.

United States, 294 U.S. 330, 350 (1935), the Court was confronted with *precisely* the same argument the government now offers here: that because one Congress cannot restrict a future Congress from exercising its constitutional powers, Congress is always free to alter or abolish contractual commitments made under earlier legislation. *Id.* In response the Court in *Perry* first observed: "[w]e do not so read the Constitution." *Id.* at 353. It then elaborated: "The argument . . . is in substance that the Government cannot by contract restrict the exercise of a sovereign power. *But the right to make binding obligations is a competence attaching to sovereignty*." *Id.* (emphasis added).[16]

Petitioner has suggested no reason for the Court to revisit this long-settled principle in this case, and there is none. The Federal Circuit properly dismissed the government's attempted assault on federal contract rights with the observation that "[t]he terms of a government contract, like any contract, do not change with the enactment of subsequent legislation absent a specific contractual provision providing for such a change." *Id.* at 37a.

432, 449 (1878); *United States ex rel. Von Hoffman v. City of Quincy*, 71 U.S. (4 Wall) 535, 543, 554-55 (1866); *Jefferson Branch Bank*, 66 U.S. (1 Black) 436, 448-50 (1862); *Hall v. Wisconsin*, 103 U.S. 302, 305 (1850).

[16] It was in this context that the Federal Circuit correctly distinguished between cases involving monetary claims and those seeking injunctive relief -- the latter by definition *do* impinge on Congress' power, *see* Pet. App. 36a-38a; the former do not. Thus, in the goodwill/contract cases involving injunctive relief claims, the courts of appeals have uniformly denied that relief. *See, e.g., Carteret Sav. Bank v. OTS*, 963 F.2d 567, 577-79 (3d Cir. 1992) and cases cited therein. By contrast, in all of the goodwill/contract cases decided to date involving monetary relief claims (including Glendale's case and the other two cases consolidated here), the thrift plaintiffs have prevailed. *See RTC v. FSLIC*, 34 F.3d 982 (10th Cir. 1994); *Far West Fed. Bank v. Director, OTS*, 787 F. Supp. 952 (D. Or. 1992), *appeal docketed sub nom. Trinity Ventures, Ltd. v. FDIC*, Nos. 92-35597, -36535 (9th Cir. July 7, 1992); *see also Transcapital Fin. Corp. v. Director, OTS*, 44 F.3d 1023, 1026 (D.C. Cir. 1995) (emphasizing that its analysis of injunctive claims "has no bearing . . . on the merits of Appellant's claim for *compensation* in the Federal Court of Claims [sic]").

3. The government lastly contends that the Federal Circuit "erred" in concluding that the "sovereign acts" doctrine does not excuse the government's otherwise clear breach of its express contract obligations in these cases. This contention as well is wrong; the Federal Circuit's holding on this point is fully consistent with this Court's precedent, with the application of the sovereign acts doctrine by the Federal Circuit and the Court of Federal Claims (and their predecessors) in a variety of recurring federal government contract contexts, and with the decision of the only other court of appeals to have addressed the doctrine's application to a contract-based claim under FIRREA.

a. The sovereign acts doctrine excuses government liability for breach of contract only where a general, *unrelated* sovereign act *incidentally* affects a contract with the government. *See Horowitz v. United States*, 267 U.S. 458 (1925).[17] Significantly, the government does not dispute that the sovereign acts doctrine is inapplicable where the claimed sovereign action targets government contracts; such acts are by definition neither incidental nor unrelated. *See* Pet. 22-24. Rather, the government quarrels only with the Federal Circuit's conclusion that "the FIRREA provisions at issue here [did] target[] thrifts that had undergone supervisory mergers, financed in part with supervisory goodwill," Pet. App. 45a. *See* Pet. 23-24. The Federal Circuit found FIRREA's targeting of goodwill contracts clear from the terms of the statute, which "plainly singles out thrifts that underwent supervisory mergers for special treatment," Pet. App. 44a, and from the legislative history, which shows that

---

[17] The doctrine's rationale is that the government should not be liable for non-performance as a result of its action as sovereign if a private contracting party would not be liable for non-performance as a result of that same sovereign action; that is, private contracting parties should "gain nothing by having the United States as their defendants." *Horowitz*, 267 U.S. at 461. Thus, in a situation where one private party cannot recover damages from another, a private party contracting with the government cannot recover either; the converse is likewise true.

Congress was well aware both that contracts like Glendale's existed and that the new capital requirement would abrogate those contracts. *Id.* at 43a-44a. The government does not dispute those facts.[18]

FIRREA's requirement that Glendale deduct the goodwill from its capital is, therefore, not an "incidental" and "unrelated" sovereign act; Congress took dead aim at these contracts and specifically decided to extinguish them. In these circumstances, the Federal Circuit's holding that the sovereign acts doctrine does not excuse the government's deliberate, direct and "targeted" repudiation of its prior contractual commitments to Glendale regarding use of goodwill as capital was clearly correct. As the court explained, "[t]he government has plainly sought to render its own performance impossible. This is not a public and general act. The sovereign acts doctrine does not apply." Pet. App. 45a. In so ruling, the Federal Circuit reached exactly the same conclusion the Tenth Circuit did in *RTC v. FSLIC*, the only other circuit decision that has addressed the government's sovereign acts defense under FIRREA.[19] No case cited by the government,

[18] Indeed, the government *cannot* contend otherwise since it has argued in other cases that "FIRREA was *designed* to abrogate any pre-existing agreements . . . authorizing the greater use of supervisory goodwill as regulatory capital." *Carteret Sav. Bank v. OTS*, 963 F.2d 567, 576 (3rd Cir. 1992) (emphasis added); *see also id.* at 579-80 (agreeing with holdings of the Sixth and Ninth Circuits that "the legislative history of FIRREA does clearly indicate that Congress intended to abrogate prior agreements to treat supervisory goodwill as capital").

[19] *RTC v. FSLIC*, 25 F.3d 1493, 1501 (10th Cir. 1994) ("The limits of this immunity are defined by the extent to which the government's failure to perform is the result of legislation targeting a class of contracts. If Congress enacts legislation targeted to abrogate pre-existing contract obligations the government owes to private citizens, the government may be properly sued for breach.").

and none that Glendale is aware of, has ever upheld the sovereign acts defense in such circumstances.[20]

b. The Federal Circuit also properly recognized that the sovereign acts defense does not lie where the claimed sovereign action abrogates a *central* contractual commitment of the government. Pet. App. 45a ("We know of no authority for [the] position that the government has a sovereign right to disavow its contractual obligations through comprehensive national legislation."). As the Federal Circuit's predecessor held in *Freedman v. United States*, 320 F.2d 359 (Ct. Cl. 1963), "the doctrine . . . laid down in *Horowitz v. United States*, . . . does not relieve the Government from liability where it has specially undertaken to perform the very act from which it later seeks to be excused." *Id.* at 366 (citation omitted).[21]

That is precisely what happened here. The contracting parties expressly intended and agreed that Glendale could include the goodwill asset in regulatory capital and amortize it

[20] The government's principal argument in response -- that because Glendale and the other contracting thrifts were granted a 'partial exception" from "more generally applicable restrictions," the restrictions themselves *were* public and general, *see* Pet. 23-24 -- is specious. That Glendale and the other affiliated thrifts were permitted to use a declining fraction of the contracted-for goodwill to meet certain capital standards (but not others) during a brief phase-out period does not, and cannot, negate the fact that the goodwill covered by Glendale's contract (and by other similar contracts) was targeted *both* by Congress *and* by FIRREA's express terms (and, for that matter, by the implementing regulations). Nor does it negate the fact that the new capital requirements hit their intended targets and thereby directly contravened the government's previous contract commitments.

[21] This has been the rule since at least *Bostwick v. United States*, 94 U.S. 65 (1877). In *Bostwick*, the Court distinguished between damage done to property occupied by the Army in the absence of a lease and that done after a lease was executed by the government. The former was held to be an uncompensable act of the sovereign; the latter a compensable "breach of contract." *Id.* at 68-69. As the Court emphasized, "All depends upon the contract." *Id.* at 69.

over 40 years. That promise was essential to make the Broward merger financially possible, and it saved the United States more than $783 million. Then, after Glendale had fully performed, the government required Glendale to "deduct" the goodwill from its capital, while the government retained the $783 million-plus benefit (and Glendale the Broward liabilities). The sovereign acts doctrine has *never* been applied in such circumstances. To the contrary, long before *Freedman* the Court of Claims recognized that even a concededly sovereign act is compensable when the act in question contravenes a specific contractual undertaking by the government.[22] The same rule has been applied by successor courts (including the Federal Circuit) ever since.[23]

As the Federal Circuit recognized, this long-established understanding of the sovereign acts doctrine is reaffirmed by this Court's decisions in *Perry* and *Lynch*. Pet. App. 45a. Both cases involved legislation that was "public and general" -- in *Perry*, the statute effected a sweeping reform of the monetary system that affected "every obligation," government and private, *see Perry*, 294 U.S. at 349 n.1, and in *Lynch*, the statute broadly repealed "all laws granting or pertaining to yearly renewable term insurance," *Lynch*, 292 U.S. at 575. Yet, in both cases, this Court held that the government was not absolved of liability for

[22] *See, e.g., Sunswick Corp. v. United States*, 75 F. Supp. 221, 228 (Ct. Cl.), *cert. denied*, 334 U.S. 827 (1948) ("We know of no reason why the Government may not by the terms of its contract bind itself for the consequences of some act on its behalf which, but for the contract, would be nonactionable as an act of the sovereign.").

[23] *See, e.g., Hills Materials Co. v. Rice*, 982 F.2d 514, 516 n.2 (Fed. Cir. 1992) ("the doctrine certainly does not prevent the government as contractor from affirmatively assuming responsibility for specific sovereign acts"); *see also Amino Bros. Co. v. United States*, 372 F.2d 485, 491 (Ct. Cl.), *cert. denied*, 389 U.S. 846 (1967) ("The government cannot make a binding promise that it will not exercise a sovereign power, but it can agree in a contract that if it does so, it will pay the other contracting party the amount by which its costs are increased by the Government's sovereign act.").

the legislation's direct abrogation of the government's obligations under the contracts involved -- in *Perry* a government bond payable in gold, and in *Lynch* a war risk insurance policy. *Perry*, 294 U.S. at 352-53; *Lynch*, 292 U.S. at 577-78.[24]

The sovereign acts doctrine has *never* been applied, as the government argues here, to excuse its outright refusal, following a private contracting party's full performance of its obligations, to honor the commitment which formed the central consideration for the contract. In the same circumstances a private party would, of course, be liable for breach of contract. The decision below was thus in accord with longstanding precedent, and the government has neither pointed to any conflict in the circuits nor claimed that the lower court decisions applying sovereign acts principles reflect any confusion requiring this Court's guidance. There is, accordingly, no occasion for this Court's review of the issue.[25]

4. Finally, there is no merit to the government's concluding argument that the Court should take this case (a) because there are approximately 100 other pending cases involving

[24] The government's attempt to distinguish these cases on the theory that they hold only that the government may not repudiate its own debts "solely to save money," Pet. 23, is doubly flawed. First, the statutory reform of the American monetary system at issue in *Perry*, for example, cannot fairly be characterized as an attempt by the government merely "to save money." Second, even if accepted, the argument would not avail the government here. The government's repudiation of the goodwill contracts was undertaken to reduce future claims on the government's deposit insurance fund, and thus fails even this government test.

[25] The government's sovereign acts defense does not in any event defeat Glendale's claims for a constitutional taking or for frustration of purpose, mistake or other quasi-contractual relief. The Court of Federal Claims deferred decision on these claims in light of its ruling on the breach of contract claim. *See* Pet. App. 107a. The availability of such alternative grounds for recovery provides even further reason for the Court to decline review of this issue. *See Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183-84 (1959).

thrifts that booked goodwill or capital credits totalling $10 billion, Pet. 24, or (b) because the courts of appeals have not consistently applied the unmistakability doctrine in *other* federal contract contexts, *id.* at 24-25.

a. The amount of money potentially at issue in a case should not be, and has never been, considered an appropriate reason for this Court to exercise its powers of review or to craft particular rules of decision. *See, e.g., O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048, 2055 (1994) (noting that "there is no federal policy that the [deposit insurance] fund should always win" and that "[o]ur cases have previously rejected [such] 'more money' arguments") and cases cited therein.[26] Indeed, a contrary rule implies a threshold above which the Federal Circuit cannot be entrusted to perform its role as the primary appellate arbiter of contract disputes involving the government.

Moreover, the liability ruling in Glendale's case does *not* resolve reflexively the liability issues in any of the other pending cases or guarantee large damage awards to those thrifts. The decisions of the Federal Circuit and the Court of Federal Claims in this case involved careful interpretations of the particular terms of specifically negotiated contracts. As the courts below noted, there was a great deal of variation in the individual deals that FSLIC and the Bank Board entered into and approved over the years. Pet. App. 166a ("the terms of the separate agreements negotiated [with] the FHLBB and FSLIC substantially differ"). Indeed, that variation is demonstrated by the very cases on which the government relies, including *Charter* and *Guaranty*.

Each of these cases thus will have to be evaluated and decided on the basis of its own facts and its own contract

---

[26] *See also United States v. Turecamo of Savannah, Inc.*, 64 U.S.L.W. 3416 (U.S. December 11, 1995) (No. 95-525) (denying *certiorari* despite United States' argument, *see* Petition for a Writ of Certiorari at 13, *Turecamo*, that the decision below extended lien liability "to contracts for supplies, service, and repairs on more than 1000 public vessels involving millions of dollars annually").

documents. The thrifts in some cases will likely succeed in establishing enforceable contract rights; in others, they may not. And in any case, establishing enforceable contract rights does not translate automatically into substantial damages; as the government concedes, Pet. 25, the circumstances of each thrift vary greatly. The outcome of that process is too uncertain to serve as an appropriate basis for this Court's exercise of its certiorari discretion.[27]

b. The government is also incorrect in suggesting that the decisions of the circuits involving *other* kinds of government contracts reflect confusion concerning the circumstances in which the unmistakability requirement applies. Pet. 24-25. Indeed, far from "refus[ing] to apply" the unmistakability principle, *id.* at 24, the Federal Circuit in *Hughes Communications Galaxy, Inc. v. United States*, 998 F.2d 953 (Fed. Cir. 1993), explicitly found that requirement satisfied in the particular circumstances of that case:

> Under our interpretation of the contract, we have no trouble concluding that Article IV obligates the government . . . in language which more than satisfies the "unmistakable terms" requirement.

Id. at 958. The other cases relied upon by the government are entirely consistent.[28]

---

[27] Nor is it likely that denial of the government's petition will spawn a flood of additional suits. FIRREA and the OTS regulations were adopted in 1989. The statute of limitations for Tucker Act suits against the government is six years. 28 U.S.C. § 2501 (1994).

[28] In *Education Assistance Corp. v. Cavazos*, 902 F.2d 617 (8th Cir.), *cert. denied*, 498 U.S. 896 (1990), the court found that application of subsequent legislation to a contract with the Department of Education did not breach the contract because, unlike in *Hughes Communications* and in this case, "[i]n its agreements with the Secretary, EAC agreed to be bound by 'all changes in the Act or regulations in accordance with their respective effective dates.'" 902 F.2d at 628. Similarly, in *Western Fuels-Utah, Inc. v. Lujan*, 895 F.2d 780 (D.C. Cir.), *cert. denied*, 498 U.S. 812 (1990), the court approved application of congressionally specified royalty rates pursuant to a

At bottom, these cases -- like the present one -- simply reflect the efforts of the courts involved to determine, in the words of the *Hughes* court, "how liability for certain contingencies was allocated by the contract." *Hughes Communications*, 998 F.2d at 958. That the government wins some cases and loses others is not surprising. The government's unhappiness with a particular court's determination of the specific contract terms and circumstances in a given case, however, provides no reason for this Court's review. Indeed, to the extent the government is dissatisfied with the allocation of risk it has been found to have contractually accepted in a given class of contracts -- or in all contracts -- it retains the power to avoid that consequence by drafting and insisting upon an appropriate clause in contracts it enters into in the future. That power negates any substantial adverse precedential effect that might otherwise argue for this Court's attention.

---

clause in the lease which permitted readjustment of the royalties at 20-year intervals and explicitly provided that the readjustment rights were subject to laws in effect at the time of the readjustment. 895 F.2d at 788.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JERRY STOUCK*
JOE G. HOLLINGSWORTH
DONALD W. FOWLER
Spriggs & Hollingsworth
1350 I Street, N.W.
Washington, D.C. 20005
(202) 898-5800

CARTER G. PHILLIPS
RICHARD D. BERNSTEIN
Sidley & Austin
1722 I Street, N.W.
Washington, D.C. 20006
(202) 736-8000

December 22, 1995

Attorneys for Respondent
Glendale Federal Bank, FSB

* Counsel of Record

Supreme Court, U.S.
FILED
JAN 10 1996
CLERK

(5)

No. 95-865

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

WINSTAR CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

12 pp

TABLE OF AUTHORITIES

Cases: Page

Bowen v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986) 3

Charter Federal Savings Bank v. *OTS*, 976 F.2d 203 (4th Cir. 1992), cert. denied, 113 S. Ct. 1643 (1993) 6, 7

Guaranty Financial Services, Inc. v. *Ryan*, 928 F.2d 994 (11th Cir. 1991) 4

Lynch v. *United States*, 292 U.S. 571 (1934) 6

Merrion v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982) 3

Perry v. *United States*, 294 U.S. 330 (1935) 6

Transcapital Fin. Corp. v. *Director, OTS*, 44 F.3d 1023 (D.C. Cir. 1995) 2

Transohio Sav. Bank v. *Director, OTS*, 967 F.2d 598 (D.C. Cir. 1992) 2, 4

United States v. *Cherokee Nation*, 480 U.S. 700 (1987) 3

Statute:

28 U.S.C. 1292(b) 9

Miscellaneous:

W. Black, *Ending Our Forebearers' Forbearances: FIRREA and Supervisory Goodwill*, 2 Stanford Law & Policy Rev. 102 (1990) 5

Nat'l Comm'n on Financial Inst. Reform, Recovery and Enforcement, *Origins and Causes of the S&L Debacle: A Blueprint for Reform, A Report to the President and Congress of the United States* (1993) 4-5

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-865

UNITED STATES OF AMERICA, PETITIONER

v.

WINSTAR CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

---

1. Respondents do not allege that the unmistakability doctrine is inapplicable in this case. Instead, they contend that the court of appeals applied the doctrine. Glendale Br. in Opp. 11; Winstar Br. in Opp. 20. That contention is insupportable.

a. The court of appeals made no reference to the unmistakability doctrine—or to any analogous principle—in the portion of its opinion in which it determined whether the contracts at issue contained the disputed promise. See Pet. App. 16a-29a. The court did not suggest or imply in this portion of its opinion that any special rule of clear statement or unmistakability should be applied. The court simply examined the contracts in this case in the same way as it would have examined any other commercial contracts.

b. The Federal Circuit stated that the reason it did not apply the unmistakability doctrine was that respondents' request for money damages did not implicate the

interests that the doctrine protects. Having completed its analysis of the terms of the contract with no reference to the unmistakability doctrine, the court only then addressed our claim "that the contracts failed to secure unmistakably the government's contractual obligations in the face of legislative change (the 'unmistakability doctrine')." Pet. App. 31a. The court noted that the Court of Federal Claims initially rejected the government's invocation of the unmistakability doctrine on the ground "that plaintiffs sought only money damages, which did not implicate the government's power to regulate." Pet. App. 32a. The court then made clear that it also was refusing to apply the doctrine in this case by concluding that "the Court of Federal Claims *properly rejected* the government's argument based on *POSSE* that its sovereign power to legislate is at issue here." Pet. App. 37a (emphasis added). The court explained:

> Money damages, in contrast to injunctive relief, presents little threat to the government's sovereign powers, other than the obvious financial incentive to honor its contracts. The Supreme Court's decision in *POSSE* is predicated on the need to protect the sovereign's legislative power *and that concern is inapplicable where money damages alone are at issue.*

Pet. App. 37a-38a (citation omitted and emphasis added).[1] Rather than defend this reasoning, respondents simply fail to acknowledge it.

---

[1] If there were any doubt that the Federal Circuit's refusal to apply the unmistakability doctrine was based on the fact that respondents sought only money damages, the court of appeals' discussion of the D.C. Circuit's decisions in this area should dispel it. In *Transohio Sav. Bank* v. *Director, OTS*, 967 F.2d 598 (D.C. Cir. 1992), the D.C. Circuit had applied the unmistakability doctrine in a case analogous to this one, except that the plaintiffs there sought injunctive relief. Later, in *Transcapital Fin. Corp.* v. *Director, OTS*, 44 F.3d 1023 (D.C. Cir. 1995), the D.C. Circuit stated that the analysis in *Transohio* was limited to cases involving injunctive relief. Commenting on that second D.C. Circuit holding, the Federal Circuit stated that it "complements our [own] decision." Pet. App. 38a. If respondents were correct that the Federal Circuit applied the unmistakability doctrine in the present case, the Federal Circuit's result would, however, directly conflict with the distinction made by the D.C. Circuit in *Transohio* and *Transcapital*.

As we explained in the petition, the court of appeals erred in finding the unmistakability doctrine inapplicable to cases seeking money damages. Pet. 13-16. The unmistakability doctrine, as articulated in *Bowen* v. *Public Agencies Opposed to Social Security Entrapment (POSSE)*, 477 U.S. 41, 52-53 (1986), *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982), *United States* v. *Cherokee Nation*, 480 U.S. 700, 707 (1987), and earlier cases, has nothing to do with the form of relief sought for a breach of contract. Those cases were concerned with claims that the government had contractually agreed not to exercise sovereign authority, not with the relief that might be awarded if such promises were violated. Indeed, *Cherokee Nation* itself involved a claim for money damages; the Court nonetheless applied the unmistakability doctrine without suggesting in any way that the claim for money damages cast doubt on the applicability of the doctrine.

c. The contracts in this case could not possibly be construed to "unmistakably" make the promises respondents claim regarding supervisory goodwill. As explained in the petition, that becomes clear by comparing two provisions. Respondents rely on Bank Board resolutions like the following:

> [in] report[s] to the Bank Board and the FSLIC, * * * any unidentifiable intangible assets resulting from accounting for the Acquisition * * * in accordance with the purchase method of accounting may be amortized by [the thrift] over a period not in excess of twenty-five (25) years by the straight line method.

Pet. App. 25a-26a. That provision makes no mention of federal capital requirements or any governmental com-

mitment regarding how such requirements will be imposed. In contrast is Statesman's contract with FSLIC regarding its capital credits, which provides:

> For the purposes of reports to the Bank Board * * *, $26 million of the contribution [made by FSLIC] *shall be credited to* [*Statesman's*] *regulatory capital account and shall constitute regulatory capital* (as defined in § 561.13 of the Insurance Regulations).

C.A. App. 803 (emphasis added). That provision makes a clear reference to regulatory capital requirements.

It was thus clearly possible to formulate contractual commitments regarding the regulatory treatment of intangible assets. With respect to the capital credit, Statesman and FSLIC did so unmistakably (though with other provisions of the agreement allocating the risk of later legislative change to Statesman, see Pet. 18). None of the thrifts did so, however, with respect to supervisory goodwill other than Statesman's capital credit. The court of appeals was therefore able to reach the result that it did only because it found no need to apply the unmistakability doctrine.[2]

[2] Respondents devote a great deal of attention to explaining why they would not have entered into the transactions without a promise that they could treat the resulting goodwill as capital for a period of decades to come. See Winstar Br. in Opp. 5-7; Glendale Br. in Opp. 5-9. The Statesman provision regarding capital credits makes clear that, had respondents needed the commitment they claim, they could have attempted to obtain it in clear, unmistakable terms. See *Transohio*, 967 F.2d at 619-620 ("We are reluctant to compensate for the absence of an unmistakable waiver given that * * * the transaction was heavily lawyered and * * * extensively negotiated."); *Guaranty Financial Services, Inc.* v. *Ryan*, 928 F.2d 994, 999 (11th Cir. 1991) (thrifts "in effect wager[ed] the chance that the rules would be changed against the potential return if they were not"). Moreover, there are many reasons why the thrift managers would have been willing to enter into these transactions without such commitments. See, *e.g.*, Nat'l Comm'n on Financial Inst. Reform, Recovery and Enforcement, *Origins and Causes of the S&L Debacle: A Blueprint for Reform, A Report to the President and Congress of the United States* 38-39 (1993) (explaining how acquisitions of insolvent thrifts "were tempting to other [thrifts] trying to stave off accounting insolvency because acquirers could show fictitious income and continue to pay (indeed increase) dividends, high salaries, and so on"); W. Black, *Ending Our Forebearers' Forbearances: FIRREA and Supervisory Goodwill*, 2 Stanford Law & Policy Rev. 102, 104-105 (1990).

Respondents rely on (Glendale Br. in Opp. 9) the court of appeals' descriptions of the government's alleged promise as "an express contractual obligation." Pet. App. 17a. That description, however, does not substitute for the analysis required by the unmistakability doctrine—an analysis that the court of appeals did not purport to apply and in fact specifically disavowed. Nor can such characterizations alter the fact that—aside from the Statesman capital credit—none of the various provisions of contracts or Bank Board resolutions cited by respondents or the courts below even mention the existence of federal capital requirements, much less unmistakably make promises regarding their application to respondents.

Respondents also cite (Glendale Br. in Opp. 12, Winstar Br. in Opp. 13) the Court of Federal Claims' statement, repeated by the Federal Circuit, that "there has been little serious dispute that the government granted the acquiring thrifts, in the clearest possible terms, the right to certain types of regulatory capital treatment." Pet. App. 36a. The court then described the government's argument as focusing on whether the government may be excused from a breach of such a commitment. The court's statements demonstrate its incorrect characterization of the government's position. The government has never denied that, prior to December, 1989, its regulatory policy permitted goodwill to be included in thrift capital calculations. But the government has argued throughout this litigation *that it did not contract to maintain that policy for 25-40 years into the future.*[3]

[3] Respondents are wrong in asserting (Winstar Br. in Opp. 16, Glendale Br. in Opp. 12) that our unmistakability argument is in-

2. Respondents also claim that the decision in this case does not conflict with the decision in *Charter Federal Savings Bank* v. *OTS*, 976 F.2d 203 (4th Cir. 1992), cert. denied, 113 S. Ct. 1643 (1993), because the Fourth Circuit in *Charter* noted that that case "did not involve a written contract of any kind between [the thrift] and the government." Winstar Br. in Opp. 20 n.6; see also Glendale Br. in Opp. 15-16. Respondent's claim is incorrect.

The Fourth Circuit in *Charter* stated that it was "reluctant to rule that a contract exists" between the thrift and the government on the facts of that case. 976 F.2d at 211. But the Fourth Circuit did *not* resolve the case on the ground that there was no such contract. Instead, it stated that "we need not decide the contract issue because we find, in any event, that the [Federal Home Loan Bank Board] did not promise to exempt Charter from the future capital regulations." *Ibid.* The Fourth Circuit stated that it would "assume, then, without deciding, the existence of an implied contract between the [Bank Board] * * * and [the thrift] *and resolve the case on the issue of contract interpretation.*" *Ibid.* (emphasis added). As explained in the petition (Pet. 16-17), the primary principle of "contract interpretation" that the Fourth Circuit used was the unmistakability doctrine (which the Federal Circuit refused to apply here), and the Fourth Circuit concluded on the basis of that doctrine (contrary to the Federal Circuit in this case) that the thrift regulators "approved [the thrift's] use of supervisory goodwill under its then statutory discretion to permit such accounting practices, *but made no explicit promise to [the thrift] of continued approval throughout the life of the amortization period.*" 976 F.2d at 212 (emphasis added).

consistent with this Court's decisions in *Lynch* v. *United States*, 292 U.S. 571 (1934), and *Perry* v. *United States*, 294 U.S. 330 (1935). There was no question in those cases that the government had made the contractual promises at issue, and that the government officials who made the promises had the authority to do so. Nor did the promises at issue in those cases involve the government's exercise of sovereign regulatory authority. See Pet. 23 n.10.

3. Respondents state that they "have never argued, and the courts below did not hold, that respondents' contracts either bound Congress not to enact contrary regulatory capital requirements or prohibited it from applying any such requirements to respondents." Winstar Br. in Opp 21; see also Glendale Br. in Opp. 18. In their view, because the breaches of the alleged promises can be vindicated by the payment of money damages, rather than injunctive relief, there need be no concern whether the pre-FIRREA thrift regulators had authority to enter into contracts that bound the government as a whole—including Congress—to exercise its regulatory authority in a certain way.[4]

Respondents' claims in this case, however, depend on the proposition that the thrift regulators had authority to bind the government to follow certain regulatory policies for 25-40 years, and that the regulatory authorities exercised that authority in the contracts at issue here. If the government incurred no such obligation, respondents would have no claim in this case. If, for example, respondents were merely claiming that the thrift regulators agreed to exercise what discretion they had under the then-existing statutory scheme to permit favorable regulatory treatment of supervisory goodwill, respondents would have no claim for breach of contract when that

[4] Under respondents' theory, the regulators could have promised that the thrifts would not be required to maintain more than a set percentage of their assets as capital for periods of 25, 40, or even 100 years. Or they could have granted respondents exemption from other regulatory requirements for similar lengthy periods of time. According to respondents, Congress's grant of authority to the regulators "to make contracts" was sufficient to permit them to bargain away the government's entire thrift regulatory scheme for more than a generation—so long as a breach of any such promise could be remedied by money damages.

discretion was removed by FIRREA. Respondents' claim, therefore, must be understood as a claim that the thrift regulators had the power to bind the government as a whole—including Congress—to a particular exercise of its regulatory authority for periods of 25-40 years.

4. Respondents claim, as they did in the court of appeals, that FIRREA is not a "public and general act" for purposes of the sovereign acts doctrine, because FIRREA's restrictions on intangible capital "were *targeted* at *supervisory* goodwill, whose very existence, as Congress well knew, was attributable to acquisition agreements with the government." Winstar Br. in Opp. 28. In another formulation, respondents state that the sovereign acts doctrine does not apply because FIRREA has more than an "incidental" effect on them. Glendale Br. in Opp. 22; Winstar Br. in Opp. 26.

FIRREA imposes a series of general limitations on the use of "intangible assets"—not just supervisory goodwill—to satisfy federal regulatory capital requirements. Those limitations govern all insured thrift institutions in all future situations, and affect many types of intangible assets other than supervisory goodwill and many thrift institutions that had never been involved in transactions in which such goodwill was created. FIRREA's capital requirements were part of a statute that "reshaped the entire thrift industry on a national level" and that "was broadly directed to the good of the general public, to the country's financial system, rather than to a specific contract that it disapproved." Pet. App. 51a (Lourie, J., dissenting). It would be difficult to find a clearer example of a "public and general act." The fact on which respondents appear to rely—that some Members of Congress were aware that FIRREA would affect those in respondents' positions, see Winstar Br. in Opp. 28; Glendale Br. in Opp. 22—does not alter that conclusion. See Pet. App. 51a (Lourie, J., dissenting).

In rejecting the application of the sovereign acts doctrine, the court of appeals relied on FIRREA's "transition rule" giving supervisory goodwill more *favorable* treatment than is accorded to other intangible assets. See Pet. App. 42a. Indeed, the transition rule is the only section of FIRREA that comes close to "singl[ing] out" thrifts in respondents' position.[6] Even if it did so, however, the "special treatment" that respondents received under that rule is more *favorable* than that which would be accorded respondents under the general rule governing intangible assets. The transition rule therefore cannot be said to be the source of respondents' complaints; the court of appeals' reliance on the transition rule to find that respondents are "singled out"—and that FIRREA is therefore not a "public and general act"—is incorrect.

5. Respondents do not dispute that an enormous amount of money is potentially at stake in this case. They do assert that the court of appeals' ruling "does *not* resolve reflexively the liability issues in any of the [approximately 100] other pending cases." Glendale Br. in Opp. 26. But the court of appeals' decision does establish that the unmistakability doctrine will not be applied in any of those cases. It also establishes that promises by thrift regulators regarding exercises of their regulatory authority will be given effect even in the face of legislative changes altering their authority. The Federal Circuit's decision also precludes the application of the sovereign acts doctrine in all of the 100 or so pending cases.

This case is a strong candidate for further review, for additional reasons as well. It was the leading case on these issues in the Federal Circuit. Both courts below authorized interlocutory review under 28 U.S.C. 1292(b) because the three consolidated cases "involved controlling questions of law as to which there is substantial ground for difference of opinion and [because] an immediate appeal may materially advance the termination of these and

---

[6] The transition rule applies to all supervisory goodwill, regardless of whether it was created pursuant to a contract. It thus applies to thrifts that are not in respondents' position.

other related cases." Pet. App. 3a. The case presents three different transactions that involve facts common to many other cases. The resulting guidance from this Court should assist in the prompt resolution of the large number of other pending cases.

Respondent Winstar argues that (Winstar Br. in Opp. 29-30) further review is not warranted because the case is in an interlocutory posture. All that remains in the Court of Federal Claims in these cases, however, is the assessment of damages; no further factual record relevant to the issues now before the court remains to be developed. Those issues are not likely to be better presented in any future case.[6]

CONCLUSION

For the foregoing reasons, as well as those stated in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JANUARY 1996

---

[6] Glendale correctly argues that our sovereign acts defense "does not in any event defeat [its] claims for a constitutional taking or for frustration of purpose, mistake or other quasi-contractual relief," and it infers from that fact that "[t]he availability of such alternative grounds for recovery provides even further reason for the Court to decline review of this issue." Glendale Br. in Opp. 25 n.25. If, however, the thrifts' various other claims are found valid, the measure of damages is likely to be very different from what it would be on the breach of contract claims on which they prevailed in the Federal Circuit. See Pet. App. 47a (Nies, J., dissenting).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1996 405017 40043

(18)

No. 95-865

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

WINSTAR CORPORATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOINT APPENDIX
VOLUME I OF II

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217
Counsel of Record for Petitioner

CHARLES J. COOPER
Shaw, Pittman, Potts, & Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000
Counsel of Record for Respondents Winstar Corporation and the Statesman Group, Inc., et al.

JERRY STOUCK
Spriggs & Hollingsworth
1350 I Street, N.W.
Ninth Floor
Washington, D.C. 20005
(202) 898-5800
Counsel of Record for Respondent Glendale Federal Bank, FSB

Petition for Writ of Certiorari Filed December 1, 1995
Certiorari Granted January 16, 1996

417 pp

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-865

UNITED STATES OF AMERICA, PETITIONER

v.

WINSTAR CORPORATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOINT APPENDIX

TABLE OF CONTENTS[1]

Page

WINSTAR

Court of Federal Claim Docket Entries, *Statesman Savings, et al.* v. *United States* (No. 90-CV-773) 1

Court of Federal Claims Docket Entries, *Winstar Corp., et al.* v. *United States* (No. 90-CV-8)..... 2

Court of Federal Claims Docket Entries, *Glendale Federal* v. *United States* (No. 90-CV-772)..... 3

Court of Appeals for the Federal Circuit Docket Entries, *Winstar Corp.* v. *United States* (No. 92-5164) 4

---

[1] The *en banc* and panel opinions of the Court of Appeals for the Federal Circuit and the opinions of the Court of Federal Claims are printed in the appendix to the petition for writ of certiorari and have not been reproduced here.

Complaint (Jan. 2, 1990)..... 6
FHLBB Memorandum from Kevin Aucello to Bob Brick (March 14, 1984)..... 37
Letter from McGladrey Hendrickson & Pullen to Harlan G. Halsne (May 10, 1984) 40
Financial Information Presentation (May 29, 1984)..... 43
FHLLB Memorandum from Nancy Shaen to Bob Brick (May 30, 1984) 46
FHLBB Memorandum from Robert Moore to Joseph Arendes (June 1, 1984)..... 49
FHLBB Memorandum from Harlan G. Halsne to J.J. Finn (June 28, 1984) 50
FHLBB Resolution No. 84-363 (July 6, 1984).. 65
FHLBB Resolution No. 84-364 (July 6, 1984).. 85
Assistance Agreement (July 12, 1984)..... 88
Combination Agreement and Plan of Merger (June 29, 1984 and July 12, 1984)..... 115
FHLBB Forbearance Letter (July 13, 1984)... 123
Affidavit of E. Ted Yoch in Support of Plaintiff's Motion for Summary Judgment As To Liability (Mar. 27, 1990)..... 125

STATESMAN

Complaint (Aug. 15, 1990) 132
FHLBB Memorandum SP-37a, with attachment (March 7, 1986) 180
Excerpts from Instructions for Thrift Financial Reports (Jan. 1987) 183
FHLBB Acquisition Proposal (Jan. 8, 1988) ... 207
Excerpts from FHLBB Business Plan (Jan. 8, 1988)..... 228
Excerpts from Holding Company Application H-(e)1 (Feb. 12, 1988)..... 241
FHLBB S-Memorandum—Proposed FSLIC-Assisted Acquisition (Feb. 26, 1988)..... 248

FHLBB Memorandum from Darrel W. Dochow to John M. Buckley, Jr. (Mar. 11, 1988)..... 276
Excerpts from FHLBB Board Meeting Minutes, Closed Session (Mar. 11, 1988) 283
Merger Agreement And Plan Of Merger for Merger of First Federal Savings Bank into Statesman Bank (Mar. 11, 1988) 286
Merger Agreement And Plan Of Merger for Merger of Peoples Federal Savings and Loan Association into Statesman Bank (Mar. 11, 1988)..... 292
Merger Agreement And Plan Of Merger for Merger of The Perpetual Savings and Loan Association into Statesman Bank (Mar. 11, 1988)..... 298
Acquisition Agreement Between FSLIC As Receiver For First Federated Savings Bank and Statesman Bank (Mar. 11, 1988)..... 304
Assistance Agreement (March 11, 1988)..... 318
Regulatory Capital Maintenance Agreement (March 1988)..... 412
Bank Board Resolution No. 88-169 (March 11, 1988)..... 439
Letter from FHLBB to Statesman Bank Granting Forbearance (March 14, 1988) 475
Excerpts from *Oversight On The Condition Of The Financial Services Industry: Hearings Before The Senate Comm. On Banking, Housing, And Urban Affairs*, 100th Cong., 2d Sess. (May 19, 25, and 26, 1988)..... 481
Illustrative Thrift Financial Reports filed by Union Federal Savings Bank of Frankton and Coast Federal Bank (1988-1989) 491
Comptroller General Op. B-240860, with enclosure (Aug. 27, 1990)..... 507

Affidavit Of D. J. Noble In Support Of Plaintiff's Motion For Summary Judgment As To Liability (Sept. 5, 1990) 517

GLENDALE

Complaint (Aug. 15, 1990) 543
FHLBB Memorandum R 31b, Accounting For Goodwill In Accordance With GAAP Is Acceptable (Sept. 1, 1981)..... 571
Letter from Peat, Marwick, Mitchell & Co. to Glendale Board of Directors, with attachment (Nov. 19, 1981)..... 575
Excerpt from Agreement Of Merger Between Glendale Federal Savings And Loan Association and First Federal Savings And Loan (Nov. 12, 1981)..... 578
FHLBB Letter to Richard Fink (Nov. 16, 1981) 580
Letter from Glendale to Lawrence Hayes (Nov. 17, 1981)..... 583
FSLIC Memorandum, Financial Information Presentation (Nov. 18, 1981)..... 586
Supervisory Action Agreement (Nov. 19, 1981).. 587
Bank Board (Forbearance Letter) (Nov. 19, 1981) 602
FHLBB Resolution No. 81-710 (Nov. 19, 1981).. 605
FHLBB Resolution No. 81-712 (Nov. 19, 1981).. 611
Excerpts from Transcript Of Client-Furnished Tapes of FHLBB Meeting (Nov. 19, 1981) .. 613
Letter from Glendale to Milton Feinerman, with enclosures (Mar. 19, 1982)..... 618
OTS Thrift Bulletin 38-1 (Jan. 9, 1990)..... 625
Affidavit Of Raymond D. Edwards In Support Of Plaintiff's Motion For Summary Judgment As To Liability (Aug. 23, 1991) 628
Affidavit Of David T. Hansen In Support Of Plaintiff's Motion For Summary Judgment As To Liability (Sept. 3, 1991) 633

Affidavit Of Harold B. Shore In Support Of Plaintiff's Motion For Summary Judgment As To Liability (Sept. 4, 1991) 639
Glendale's Proposed Findings Of Uncontroverted Fact (Sept. 13, 1991) 643
Orders Allowing Certiorari 648

UNITED STATES COURT OF FEDERAL CLAIMS

No. 90-CV-773

STATESMAN SAVINGS, ET AL.

v.

UNITED STATES OF AMERICA

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
8/15/90	Complaint filed. Filing fee $120.
7/24/92	Opinion entered in this and 90-772C denying [5-1] motion to Dismiss pursuant to Rule 12(b), granting [4-1] motion for Summary Judgment as to liability.
8/27/92	See 90-8C for Order from CAFC granting defendant's interlocutory notice of appeal in this case and 90-772C.
11/13/92	Order entered in this, 90-773C and 90-772C directing defendant to file its answer 30 days after the CAFC rules in the pending interlocutory appeal.

UNITED STATES COURT OF FEDERAL CLAIMS

No. 90-CV-8

WINSTAR CORPORATION, ET AL.

v.

UNITED STATES OF AMERICA

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1/2/90	Complaint filed. Filing fee $120.
4/21/92	Opinion entered finding that a binding contract existed between the government and plaintiffs and that a breach occurred, with the case to move forward to determine plaintiffs' injury etc.
7/24/92	See 90-773C for Opinion Consolidating this Case with 90-773C and 90-772C.
8/27/92	Order from CAFC granting defendant's interlocutory notice of appeal filed in this case and 90-772C and 90-773C.
11/13/93	Order entered in this, 90-773C and 90-772C directing defendant to file its answer 30 days after the CAFC rules in the pending interlocutory appeal.

UNITED STATES COURT OF FEDERAL CLAIMS

No. 90-CV-772

GLENDALE FEDERAL

v.

UNITED STATES OF AMERICA

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
8/15/90	Complaint filed. Filing fee $120.
7/24/92	See 90-773C for Opinion granting [4-1] motion for Summary Judgment as to liability; denying defendant's motion to dismiss etc.
8/27/92	See 90-8C for Order from CAFC granting defendant's interlocutory notice of appeal in this case and 90-773C.
11/13/92	Order entered in this, 90-8C and 90-773C directing defendant to file its answer 30 days after the CAFC rules in the pending interlocutory appeal.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 92-5164

WINSTAR CORPORATION

v.

UNITED STATES

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
August 28, 1992	Docket entries, docketed. Notice sent to the parties.
January 6, 1993	Argued. (Nies, CJ, Rich & Newman, JJ).
May 25, 1993	Reversed and remanded. (Nies, CJ) "Judgment entered"
August 18, 1993	Order: Petitions for rehearing granted, but only to make changes [as shown in order] in the text of the opinion; judgment of the court entered May 25, 1993, is vacated and opinion of the court, as amended, accompanying said judgment is withdrawn.

February 10, 1994	Submitted after oral argument by Douglas Letter, Charles J. Cooper and Jerry Stouck (in banc) (Nies, Rich, Newman, Archer, Mayer, Michel, Plager, Lourie, Clevenger, Rader and Schall)
August 30, 1995	Affirmed. Opinion for the Court filed by Chief Judge Archer, in which Circuit Judges Rich, Newman, Mayer, Michel, Plager, Clevenger, Rader, and Schall join. "Judgment entered"
August 30, 1995	Dissenting opinions filed by Circuit Judges Nies, and Lourie.

UNITED STATES CLAIMS COURT

Civil Action No. 154-90-8-C

WINSTAR CORPORATION,
1711 West County Road B
Suite 300 South
Roseville, Minnesota 55113,

and

UNITED FEDERAL SAVINGS BANK
1715 West County Road B2
Roseville, Minnesota 55113, *Plaintiffs*,

v.

THE UNITED STATES, *Defendant.*

COMPLAINT

For its Complaint against the United States (hereinafter sometimes referred to as the "government"), the plaintiffs Winstar Corporation ("Winstar") and United Federal Savings Bank ("United") state as follows:

1. Winstar is a Minnesota corporation organized in 1984 for the purpose of acquiring an insolvent savings and loan institution, Windom Federal

Savings and Loan Association ("Windom"), in a merger induced by the Federal Savings and Loan Insurance Corporation ("FSLIC") and the Federal Home Loan Bank Board ("FHLBB") pursuant to their statutory and supervisory authority over federally insured savings and loan institutions (hereinafter referred to as "thrifts" or "thrift institutions").

2. United is a Minnesota corporation, all of the stock of which is owned by Winstar. United was formed in 1984 for the purpose of acquiring Windom, which was merged into United that year.

3. As shown in more detail below, Winstar formed United and acquired Windom pursuant to Winstar and United's contract with the government, which obviated Windom's liquidation by FSLIC and FHLBB and, consequently, saved FSLIC's insurance fund millions of dollars that it would have been obligated to pay to creditors and depositors of Windom had FSLIC and FHLBB been forced to liquidate it. Winstar and United have fully performed their obligations under their contract with the United States. Although the United States has received all of the benefits of its contract with Winstar and United, the United States has breached its contract with the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. Law. No. 101-75, 103 Stat. 183. The United States' breach of its contract with Winstar and United entirely frustrates the purpose of the contract. Additionally, FIRREA's repudiation and abrogation of the government's contractual promises to Winstar and United constitute a taking of Winstar and United's property without just compensation in violation of the Fifth Amendment to the United States Constitution and a deprivation of Winstar and United's property without due process of law in

violation of the Fifth Amendment to the United States Constitution.

JURISDICTION

4. This court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1491(a)(1).

BACKGROUND

5. During the late 1970's and early 1980's unprecedented high interest rates pushed the thrift industry's cost of retaining and obtaining new deposits substantially above the rate of return on long-term, fixed-rate mortgages in thrift portfolios, precipitating a financial crisis in the thrift industry. By mid-1981, the thrift industry's cost of funds had risen to 10.31 percent, substantially exceeding the 9.75 percent average return on thrift mortgage portfolios. This "negative spread" widened in 1982.

6. In order to present massive withdrawals by depositors, thrift institutions were forced to pay higher rates on savings accounts. Savers nonetheless withdrew $31.8 billion more than they deposited in 1981-1982.

7. As a result of the substantial negative spread between the thrift industry's cost of funds and its return on assets, and the large net withdrawal of deposits, the thrift industry sustained an operating loss of $8.9 billion in 1981-1982, with a record $3.3 billion loss in the first half of 1982 alone. During that period the thrift industry's net worth declined more than $7 billion. In March 1982 Richard T. Pratt, then

Chairman of FHLBB, advised a congressional committee: "[T]he thrift industry in the United States is undergoing a severe financial crisis ... [H]igh and volatile interest rates ... are literally threatening the survival of this industry...."

8. Many FSLIC-insured thrift institutions either became insolvent or were threatened with insolvency in the early 1980's, and FSLIC's insurance fund was faced with the potential loss of many billions of dollars in claims by depositors of these insolvent or troubled thrifts. For example, during the last half of 1981 and the first half of 1982, more than 80 percent of all FSLIC-insured thrift institutions incurred operating losses. As of the end of 1981, almost 10 percent of FSLIC-insured thrift institutions had a net worth of less than 2 percent of their total assets. Three hundred fifty-six (356) FSLIC-insured thrift institutions with $72 billion in assets fell into this category.

9. Under the National Housing Act of 1934, as amended, FSLIC was at all times relevant to this action authorized to facilitate, upon terms and conditions prescribed by FSLIC, the merger of a failing FSLIC-insured thrift institution into a financially sound FSLIC-insured thrift institution by providing financial assistance in the form of promissory notes ("FSLIC notes") or cash contributions to the healthy institution or by guaranteeing it against loss by reason of the merger, so long as the cost of the financial assistance provided by FSLIC did not exceed the expense that would have been incurred in liquidating the institution and paying insurance claims upon its accounts.

10. Faced with a large number of failing thrift institutions, FHLBB adopted and aggressively implemented a policy of requiring insolvent or troubled

thrift institutions to merge into financially sound acquired institutions. With respect to many such "supervisory" mergers, FSLIC exercised its authority under the National Housing Act to provide assistance in the form of cash contributions, FSLIC notes, and/or guarantees to induce financially sound acquired institutions to merge with insolvent or troubled thrifts.

11. During the first 5 months of 1981, FSLIC provided financial assistance in 7 supervisory mergers. These 7 troubled FSLIC-insured thrifts had assets totaling $1.5 billion. FSLIC provided assistance in the form of cash contributions, FSLIC notes, and asset purchases at a total cost (at present value) of $344 million. FSLIC's present value cost of arranging these supervisory mergers was thus 22 percent of the total assets of the troubled thrifts, a typical cost-asset ratio for FSLIC-assisted supervisory mergers over the previous several years. Measured another way, the cost of arranging these supervisory mergers was 75 percent of the cost of liquidating the 7 trouble thrifts, also a typical ratio for FSLIC-assisted supervisory mergers. The financial assistance provided by FSLIC in these supervisory mergers represented a cash outflow of about 200 percent of the cash inflow to FSLIC during the 5-month period. In May 1981 FSLIC ran out of cash and was forced to sell at a discount over $150 million from its long-term bond portfolio to fund its current operations.

12. As the crisis in the thrift industry continued to worsen, and more and more FSLIC-insured thrift institutions became insolvent or troubled, FSLIC and FHLBB recognized that continuing to facilitate supervisory mergers with cash contributions and FSLIC notes would quickly and entirely exhaust the

insurance fund, which at the end of 1981 had total assets of $7 billion. Indeed, during the last 7 months of 1981, FSLIC provided financial assistance in connection with 23 supervisory mergers. The 23 failed thrift institutions had assets of $12.3 billion. If FSLIC had provided cash contributions and FSLIC notes at historic levels in order to induce financially healthy acquirer institutions to enter into these supervisory mergers, the cost to FSLIC would have been approximately $2.7 billion. Similarly, in 1982 FSLIC provided financial assistance in connection with 49 supervisory transactions (44 FSLIC-assisted mergers and 5 FSLIC-assisted holding company acquisitions), involving 77 insolvent or failing thrift institutions with assets totaling $31.2 billion. If FSLIC had provided cash contributions and FSLIC notes at historic levels in connection with these supervisory mergers, the cost to FSLIC would have been at least $6.9 billion. According to FSLIC's own calculations, providing financial assistance at historic levels would have exhausted the FSLIC insurance fund by April of 1982.

13. In mid-1981, FSLIC and FHLBB were thus forced to revise their policies and practices regarding the provision of financial assistance in supervisory mergers in order to prevent, or at least forestall, exhaustion of the FSLIC insurance fund. As described below, because FSLIC and FHLBB could no longer provide the amount of cash or other tangible financial assistance necessary to induce healthy acquirer institutions to merge with insolvent or troubled FSLIC-insured thrifts, FSLIC and FHLBB began inducing and arranging supervisory mergers by providing assistance in the form of an intangible asset—"supervisory goodwill." FSLIC and FHLBB also expanded the number of potential acquirers of

insolvent or troubled FSLIC-insured thrift institutions by permitting interstate mergers (in the absence of an acceptable merger proposal from a financially sound in-state acquirer institution), and inter-industry mergers (in the absence of an acceptable merger proposal from either an in-state or out-of-state thrift institution). In evaluating merger proposals, FSLIC's principal objective was to merge the insolvent or troubled thrift institution into a healthy acquirer at the lowest possible cost to FSLIC. As H. Brent Beesley, then Director of FSLIC, stated in April 1982: "Our criterion used in evaluating our alternatives is simple: Which alternative represents the least cost to the FSLIC and the public—all things considered?"

14. In order to induce financially sound acquirer institutions to merge with insolvent or failing FSLIC-insured thrifts with little or no cash contributions, FSLIC notes, or other tangible financial assistance from FSLIC, FSLIC and FHLBB relied primarily upon an aggressive application of the "purchase method" of accounting for the mergers. The Generally Accepted Accounting Principles ("GAAP") applicable at the time provided that in mergers and acquisitions using the purchase method of accounting, the book value of the assets and liabilities of an acquired thrift institution should be adjusted ("marked to market") to fair market value at the time of the acquisition, and that any excess in the cost of the acquisition (which includes any liabilities assumed by the acquirer) over the fair market value of the acquirer assets should be separately recorded on the acquirer institution's books as "goodwill"—an intangible, non-earning asset that may be amortized on a straight-line basis over a period of up to 40 years.

15. Because of the high interest rates prevailing at the time, the fair market value of the lower yielding

fixed-rate mortgage loans held by most acquired institutions was significantly less than the mortgage loans' book value (the face amount of the loans). Accordingly, in the typical supervisory merger at that time, the aggregate fair market value of the liabilities assumed by the acquirer institution exceeded the aggregate fair market value of the acquired institution's fixed-rate loans and other assets. The amount by which the acquired institution's liabilities exceed its assets is reflected on the merged institution's books as goodwill. Goodwill recorded in connection with a supervisory merger is known as "supervisory goodwill."

16. Supervisory goodwill was recorded on the merged institution's balance sheet as an asset includable in capital under GAAP and under FHLBB's regulations governing the minimum capital requirements of FSLIC-insured thrift institutions. The ability to include supervisory goodwill as capital for purposes of satisfying FHLBB's minimum capital requirements and to amortize it over a period of up to 35 years was essential to inducing healthy acquirer institutions to merge with insolvent or troubled FSLIC-insured thrifts. By assuring acquirer institutions in supervisory mergers that supervisory goodwill would be treated in the above-described manner for regulatory purposes, FSLIC and FHLBB were able to induce and arrange supervisory mergers with minimal cash contributions and other tangible financial assistance. FSLIC and FHLBB thus saved many billions of dollars in financial assistance that FSLIC would otherwise have had to pay in order to resolve scores of insolvent and troubled FSLIC-insured thrift institutions.

17. As part of its effort to induce and arrange supervisory mergers by using supervisory goodwill in

the above-described manner, FHLBB took steps to assure the thrift industry that GAAP would control in determining the application of purchase method accounting and the treatment of supervisory goodwill in supervisory mergers. In August 1981, FHLBB withdrew a proposed rule change that would have imposed regulatory standards more stringent than GAAP for accounting for supervisory goodwill. The proposed rule would have limited the inclusion of supervisory goodwill in regulatory capital to 30 percent of the merged institution's net worth and would have required that supervisory goodwill be amortized over a period no longer than ten years. In withdrawing the proposed rule, the FHLBB stated that a principal reason for its action was that the proposal could "discourage potential merger partners from consummating necessary mergers." In September 1981 FHLBB issued Memorandum R31b, which made clear that, as a matter of FHLBB policy, GAAP would control in determining the application of purchase method accounting and the treatment of supervisory goodwill in supervisory mergers.

18. During the last 7 months of 1981, FSLIC provided tangible financial assistance (e.g. cash, FSLIC notes) in connection with the merger of 23 insolvent or troubled FSLIC-insured thrift institutions with assets totaling $12.3 billion. These 23 supervisory mergers were arranged at a present value cost to FSLIC of $663 million, or 5.1 percent of assets—approximately one-fourth of the historical cost-asset ratio of FSLIC-assisted supervisory mergers. Measured as a percentage of the cost of liquidation, the present value cost of these 23 cases was only 18 percent, down from historical levels of 65-75 percent. Similarly, in 1982 FSLIC provided financial assistance in connection with 49 supervisory

mergers involving 77 FSLIC-insured insolvent or troubled thrifts with assets totaling $31.2 billion. The present value cost to FSLIC of these supervisory mergers was $1.2 billion, or 3.8 percent of assets. As a percent of the cost of liquidation, this present value cost was 16.3 percent. During this 19-month period, if FSLIC had been required to provide cash and other tangible financial assistance at historic levels in order to induce and arrange these supervisory mergers, the cost to FSLIC would have been approximately $9.6 billion. The cost to FSLIC would have been higher still if FSLIC had been forced to liquidate the acquired thrifts. The substantial reductions in costs to FSLIC of financial assistance in FSLIC-assisted supervisory mergers during this 19-month period were due in large part to FSLIC's use of supervisory goodwill through purchase method accounting. As then-Chairman Pratt stated in March 1982: "[B]y using mergers as a supervisory tool ..., we are seeking to spread as much of the industry's own net worth as possible over the industry's trouble spots as a means of conserving FSLIC's insurance fund." In effect, by using supervisory goodwill in accounting for supervisory mergers under the purchase method, FSLIC transferred most of its cost of resolving insolvent or failing thrifts to the healthy members of the industry and their shareholders.

19. Many acquirer institutions were induced by FSLIC and FHLBB to merge with insolvent or failing FSLIC-insured institutions with *no* tangible financial assistance from FSLIC, but *only* supervisory goodwill. In 1981 FSLIC and FHLBB arranged supervisory mergers for 58 insolvent or troubled FSLIC-insured thrifts with total assets of $3.6 billion, without providing any tangible financial assistance. In 1982 FSLIC and FHLBB arranged 166

supervisory mergers without providing tangible financial assistance. Most of these unassisted supervisory mergers arranged by FSLIC and FHLBB in 1981 and 1982 involved substantial amounts of supervisory goodwill.

20. In 1982 the Financial Accounting Standards Board, which promulgates GAAP, issued Statement of Financial Accounting Standards No. 72 ("FASB 72"), which amended GAAP applicable to mergers initiated after September 30, 1982. As applied to United, FASB 72 generally would require that goodwill be amortized over a period of approximately 15 years. This change in GAAP did not alter FHLBB's and FSLIC's regulatory policies and practices with regard to supervisory goodwill. For regulatory accounting purposes, FHLBB and FSLIC continued to induce healthy institutions to acquire failing thrifts by allowing supervisory goodwill to be included in capital and amortized over a period of time exceeding that now allowed by GAAP.

21. The nature of the problems affecting the thrift industry changed in 1983-1984. After mid-1982, market interest rates declined, and the thrift industry's "negative spread" improved. But in 1983 and 1984 thrifts increasingly faced severe asset quality problems. This asset quality problem threatened many thrift institutions that were just recovering from the negative spread problems of 1981-1982. Thirty-five percent of all FSLIC-insured thrifts lost money in the second half of 1983.

22. Although economic conditions improved in 1983, the number of problem cases and the volume of assets handled by FSLIC in default prevention transactions continued at record level in the year. The FSLIC resolved 53 problem cases involving $17.6 billion in assets in 1983. This marked a decrease from 77

FSLIC-resolved cases in 1982, but the complexity of the problem cases increased significantly. FSLIC realized significant cost savings by resolving most of these problem cases through interstate and interindustry acquisitions. Through aggressive use of purchase method accounting, FSLIC saved an estimated $2.4 billion over the cost of liquidation in resolving these problem cases.

23. Overall thrift industry profitability declined in 1984, despite the fact that interest rates were far below the 1981-1982 levels. In 1984 FSLIC resolved 27 problem cases involving $5.5 billion in assets. The continued growth in the size and complexity of problem cases requiring FSLIC intervention, however, created a record-high demand on FSLIC resources, precipitating a decline in FSLIC reserves from $6.4 billion at the end of 1983 to approximately $5.6 billion at the end of 1984. During 1984, despite FSLIC's efforts to obtain less costly resolutions, FSLIC was forced to place 9 institutions into liquidating receiverships. The other 18 problem cases were resolved by FSLIC at approximately 45 percent of the estimated cost of liquidation, or a savings of $693 million, largely through the use of supervisory goodwill to induce healthy institutions to take over the failing thrifts. One of the 27 problem cases of 1984, resolved through the use of supervisory goodwill, was the FSLIC-assisted takeover of Windom Federal Savings & Loan.

THE MERGER

24. In late 1983 Windom faced insolvency. In March of that year Windom's Board of Directors acknowledged that grounds existed for the appointment of a

conservator or receiver, and that Windom's failure could not be prevented without action by FSLIC. For the fiscal year ended June 30, 1983, the accounting firm of McGladrey Hendrickson & Co. reported a net loss for Windom of $2,766,269.00, and concluded that Windom "may be unable to continue in existence." As of December 31, 1983, Windom reported a net worth of negative $2.63 million on assets of $50.1 million.

25. As the FHLBB stated in a Resolution approving United's merger with Windom, "[s]evere financial conditions exist which threaten the stability of Windom." In 1984 FHLBB specifically found that "Windom is insolvent in that its assets are less than its obligations to creditors and others, including its members." In an effort to avoid the expense of liquidating Windom, FHLBB began seeking financially sound merger partners in 1983.

26. In soliciting merger proposals, FSLIC and FHLBB sought to attract financially sound acquirer institutions with sufficient financial and managerial resources to arrest Windom's further deterioration, and, over time, to place it on a sound financial footing. Winstar was such an institution.

27. In 1983 Winstar submitted a bid for the acquisition of Windom, and Winstar began negotiating with FHLBB and FSLIC regarding its proposed acquisition of Windom. Throughout the entire bidding and negotiating process it was understood that the entity that acquired Windom would be able to record as supervisory goodwill the amount by which the market value of Windom's liabilities exceeded the market value of its assets, and to amortize that goodwill over a long period of time, such as 30 to 40 years.

28. Under the terms negotiated by the parties, FSLIC promised to provide to United a cash

contribution of $1,950,000, plus a sum equal to Windom's aggregate negative net worth (the amount by which its liabilities exceeded its assets, measured at book value rather than fair market value). In return, Winstar agreed to form United and to invest $2 million in cash in United through the purchase of all of United's common stock.

29. FSLIC and FHLBB determined that Winstar's bid was the most attractive of all bids made for Windom. After FSLIC and FHLBB selected the bid, Winstar formed United, which entered into a "Combination Agreement and Plan of Merger" ("Merger Agreement") with Windom setting out the terms of the acquisition. The Merger Agreement was expressly conditioned upon FSLIC's execution of an Assistance Agreement approved by FHLBB.

30. The Merger Agreement was incorporated by reference into the Assistance Agreement among FSLIC, Winstar, and United. The Assistance Agreement expressly states that FSLIC had determined, pursuant to Section 406 of the National Housing Act, that Windom "is in danger of default and that the amount of [FSLIC's financial] assistance and indemnification would be less than the losses [FSLIC] would sustain upon the liquidation of [Windom] through a receivership accompanied by the payment of insurance of accounts."

31. In entering into the Assistance Agreement with Winstar and United, FSLIC determined that Winstar and United's proposal would entail the least amount of tangible financial assistance from FSLIC and that Winstar and United possessed the financial and managerial resources necessary to halt Windom's further decline and, over time, to restore it to profitability. In keeping with the terms negotiated by the parties, the Assistance Agreement called for

FSLIC to provide to United a cash contribution of $1,950,000, plus a sum equal to Windom's aggregate negative net worth (the amount by which its liabilities exceeded its assets, measured at face value rather than fair market value). The Assistance Agreement provides that the $1,950,000 cash contribution shall be directly credited to United's regulatory net worth requirements.

32. The Assistance Agreement provides that the accounting treatment for the transaction shall be governed by GAAP, except that where GAAP conflict with the Assistance Agreement, FHLBB or FSLIC regulations, or FHLBB or FSLIC resolutions or actions, then the Agreement, regulation, resolution, or action shall govern.

33. The Assistance Agreement expressly referred to FHLBB's Resolution No. 84-363 approving the supervisory merger. In that resolution, FHLBB, as the operating head of FSLIC, expressly determined, pursuant to its authority under Section 406 of the National Housing Act, that "(1) financial assistance by the FSLIC is necessary to prevent the default of Windom and to facilitate the Merger with [United], and (2) the amount of such assistance, to be provided in accordance with the terms and conditions of the proposed Assistance Agreement, would not exceed the amount reasonably necessary to save the cost of liquidating Windom through a receivership accompanied by the payment of insurance of accounts...."

34. The FHLBB Resolution recognized that the merger would result in goodwill, providing that United

> shall furnish an analysis, accompanied by a concurring option from its independent public accountants, satisfactory to the Supervisory Agent and to the Office of Examinations and Supervisions, which (i) specifically describes as of the closing date, any intangible assets, including goodwill or the discounts and premiums arising from the acquisition to be recorded on [United's] consolidated books; and (ii) substantiates the reasonableness and conformity with regulatory requirements of the amounts attributed to intangible assets, including goodwill, and the discounts and premiums and the related amortization periods and methods....

The conditions referred to in the FHLBB Resolution were satisfied by Winstar and United.

35. Also as part of the inducement for the merger, FHLBB set forth its commitment regarding the accounting treatment to be given to supervisory goodwill in a separate forbearance letter to United's Board of Directors. That forbearance letter confirms the parties' understanding that:

> For purposes of reporting to [FHLBB], the value of any intangible assets resulting from accounting for the merger in accordance with the purchase method may be amortized by [United] over a period not to exceed 35 years by the straight-line method ....

36. The forbearance letter also confirmed that United may book the $1,950,000 cash contribution from FSLIC "as a direct credit to its net worth."

37. The supervisory merger between United and Windom was consummated on July 12, 1984, in accordance with the terms and conditions set forth in the agreements described above. Under the merger Winstar paid out of its pocket $2 million to acquire Windom through its merger with United. The resulting institution became United.

38. Under the Assistance Agreement FSLIC contributed $1,950,000 in cash. FSLIC ultimately paid $3,694,499 as its contribution based on Windom's aggregate negative net worth.

39. In reliance upon FSLIC's and FHLBB's express agreements concerning the use of purchase method accounting, the assets and liabilities of Windom were adjusted to fair market value at the time of the supervisory merger, and the resulting excess of liabilities over assets was recorded on United's books as supervisory goodwill to be included in capital and amortized on a straight-line basis over a period of 35 years. The amount of supervisory goodwill ultimately recorded by United as a result of the acquisition of Windom was $10,654,419. United also included the FSLIC cash contribution of $1,950,000 as capital. In financial reports filed with FSLIC and FHLBB since the supervisory merger, United has consistently booked supervisory goodwill as an asset included in capital for regulatory purposes, in accordance with, and in reliance upon, FSLIC's and FHLBB's express agreements. United has also consistently amortized the supervisory goodwill over a period of 35 years on a straight line basis, in accordance with the agreements. Prior to the enactment of FIRREA, neither FSLIC nor FHLBB ever objected to United's treatment of supervisory goodwill.

40. FSLIC and FHLBB benefited enormously from the use of supervisory goodwill in connection with the supervisory merger of United and Windom. At the time of the merger, the fair market value of Windom's liabilities far exceeded that of its assets by $14.3 million. Liquidating Windom at that time would have cost FSLIC considerably more than $14.3 million, due to resolution costs such as brokerage fees and holding costs. Moreover, if the purchase method

of accounting for the supervisory merger had not been used and FSLIC and FHLBB had been required to provide tangible financial assistance to Winstar and United at pre-1981 levels, it would have cost FSLIC and FHLBB approximately $11 million to induce and arrange the supervisory merger.

41. After the merger with Windom, United's *tangible* net worth (i.e., exclusive of supervisory goodwill) was approximately *negative* $6.7 million. Obviously the purchase method of accounting for the proposed merger was integral to Winstar and United. Had Winstar and United not been permitted to record on United's books supervisory goodwill in the amount by which Windom's liabilities exceeded the fair market value of its assets, their acquisition of Windom on the financial terms proposed in their bid would have rendered United insolvent and subject to liquidation by FSLIC and FHLBB. Winstar and United would not have entered into such a transaction. Nor would they have made a proposal or entered into a transaction for the acquisition of Windom that did not include a lengthy amortization period in which to return Windom to profitability and to gradually replace the supervisory goodwill with tangible assets. Thus, Winstar's willingness to form United and to acquire Windom on the financial terms proposed in the bid, and Winstar's willingness to invest $2 million in United, were absolutely conditioned on FHLBB's and FSLIC's agreement to permit United to report supervisory goodwill as an asset included in capital for regulatory purposes and to amortize that supervisory goodwill over a 35-year period. Absent the specified accounting treatment, Winstar and United either would have insisted upon receiving more than $5,644,500 in tangible financial assistance from FSLIC or would have withdrawn the offer. In order to

maintain United's tangible capital at 3 percent of liabilities, the regulatory minimum prevailing at the time, FSLIC would have had to contribute $15.8 million in cash or other tangible financial assistance.

42. In 1988 Winstar purchased additional common stock of United for an additional $800,000. Winstar would not have made this investment in the absence of the United States' agreement to the specified accounting treatment for goodwill, or if Winstar or United had foreseen that the government would renege on that agreement.

43. Winstar and United have complied in good faith with all the terms and conditions of the agreements relating to the supervisory merger and have otherwise fully performed their undertakings in connection therewith.

44. Since the acquisition of Windom by Winstar and United, the institution's financial position has greatly improved. As of September 30, 1989 it would have cost approximately $13.2 million to liquidate United, more than $1 million less than the estimated $14.3 million cost to liquidate Windom before the merger.

45. FSLIC's and FHLBB's contractual promises, for which Winstar and United provided substantial consideration and on which Winstar and United detrimentally relied in fully performing their obligations under their agreements with FSLIC and FHLBB, entitle United to record supervisory goodwill arising from the above-described supervisory merger as an asset included in capital for purposes of regulatory capital requirements. Winstar and United's contract rights arising out of the above-described agreements with FSLIC and FHLBB constitute property within the meaning of the Fifth Amendment to the United States Constitution.

FIRREA

46. FIRREA was signed into law by President Bush on August 9, 1989. Section 301 of FIRREA establishes OTS as an office in the Department of the Treasury. Section 301 also establishes the position of the Director of OTS, who shall be subject to the general oversight of the Secretary of the Treasury, except that the Secretary may not intervene in any matter or proceeding before the Director unless otherwise provided by law. The Director is the chief regulator of the thrift industry, empowered by FIRREA to conduct examinations, proscribe regulations, and issue orders as necessary to insure the safe and sound operation of thrifts.

47. Section 301 of FIRREA requires the Director of OTS to promulgate final regulations establishing minimum capital requirements for federally insured thrifts. These minimum capital requirements became effective December 7, 1989, and require federally insured thrifts to:

(a) maintain "tangible capital," which excludes supervisory goodwill, in an amount not less than 1.5 percent of the thrift's assets;
(b) maintain "core capital," as defined in the statute, in an amount not less than 3 percent of the thrift's assets; and
(c) maintain "risk-based capital" in an amount not materially less than that required by the Comptroller of the Currency for national banks.

48. FIRREA provides that "tangible capital" shall not include supervisory goodwill, and that only limited amounts of "core capital" may be made up of supervisory goodwill. Prior to January 1, 1992, the amount of supervisory goodwill includable in core

capital may not exceed 1.5 percent of total assets. Thereafter, the amount of supervisory goodwill (as a percentage of assets) includable in core capital declines each year, in accordance with the following schedule:

January 1, 1991, to December 31, 1992—	1.0 percent
January 1, 1993, to December 31, 1993—	0.75 percent
January 1, 1994, to December 31, 1994—	0.375 percent
Thereafter	0 percent

For purposes of the minimum capital requirements, supervisory goodwill must be amortized over a period not to exceed 20 years.

49. FIRREA also requires the Director of OTS to enforce the following sanctions against federally insured thrifts that do not meet the minimum capital standards promulgated under FIRREA:

(a) After January 1, 1991, the Director must prohibit the asset growth of any federally insured thrift not in compliance with regulatory capital standards, except that the Director may approve a "limited growth exception" upon specified conditions. In addition, the Director may restrict the asset growth of any such thrift at any time prior to January 1, 1991.

(b) No later than January 6, 1990, the Director must require thrifts that do not meet minimum capital standards under FIRREA to submit a plan that (1) addresses the thrift's need for increased capital under FIRREA; (2) describes the manner in which the thrift will increase its capital to achieve the minimum capital standards; (3) specifies types and levels of activities

the thrift will engage in; (4) requires any increase in assets to be accompanied by specified increases in tangible and risk-based capital; and (5) is acceptable to the Director. The Director must treat any material failure to comply with such a plan as an unsafe and unsound practice.

(c) After January 1, 1991, the Director *must* require federally insured thrifts that do not meet minimum capital standards under FIRREA to comply with a capital directive which may include restrictions on the payment of dividends and on compensation, as the Director determines to be appropriate. FIRREA permits, but does not require, the Director to exempt thrifts from receipt of a capital directive in certain circumstances.

50. The Director may impose other sanctions on federally insured thrifts that do not meet minimum capital standards promulgated under FIRREA:

(a) The Director, in his discretion, may treat any thrift's failure to maintain capital at minimum regulatory levels as an unsafe or unsound practice subjecting the thrift to a range of further actions by the Director, including, among other things, issuance of cease and desist orders, appointment of a conservator or receiver, and suspension or removal of officers and directors.

(b) Such thrifts also must notify the Director of the proposed addition of any individual to the board of directors or of the employment of any individual as a senior executive officer of the thrift 30 days before such addition or employment becomes effective, and the Director may

before the end of that 30 days disapprove the addition or employment.

51. Federally insured thrifts that do not meet minimum capital standards are characterized by FIRREA as "troubled institutions" and beginning February 4, 1990, will be prohibited form accepting brokered deposits subject only to a case-by-case waiver by the FDIC.

OTS CAPITAL REGULATION

52. On November 8, 1989, OTS published minimum capital regulations ("OTS capital regulation") pursuant to FIRREA. The OTS capital regulation became effective on December 7, 1989.

53. In accordance with FIRREA, the OTS capital regulation establishes a minimum "tangible" capital requirement of 1.5 percent of total assets and a minimum "core" capital requirement of 3 percent of total assets. Supervisory goodwill cannot be counted as "tangible" capital at all, and can be counted as "core" capital only in accordance with the phase-out schedule set forth in FIRREA (see paragraph 48 above).

54. FIRREA does not require that supervisory goodwill be excluded from capital for purposes of determining compliance with minimum "risk-based" capital requirements. Nonetheless, the OTS capital regulation permits the inclusion of supervisory goodwill in capital for purposes of the minimum "risk-based" capital requirement only in accordance with the phase-out schedule set forth in FIRREA for determining compliance with the minimum "core" capital requirement (see paragraph 48 above).

55. Apart from the requirements and restrictions imposed by FIRREA on federally insured thrift

institutions that fail to meet minimum capital requirements, the OTS capital regulation mandates a variety of additional consequences. For example, in addition to submitting a capital plan for achieving compliance with the minimal capital requirements, a non-complying thrift must, under the OTS capital regulation, certify that while the plan is under review by OTS, it will not (absent OTS approval) (1) grow beyond net interest credited, (2) make any capital distributions, or (3) act inconsistently with any other limitations on activities established by statute, regulation, or by OTS in supervisory guidance. If a plan is not approved by OTS, the submitting thrift "shall immediately and without any further action" refrain from increasing its assets beyond the amount held on the day it receives notice of the disapproval and comply with any other restrictions or limitations set forth in OTS's written disapproval of the plan. The OTS capital regulation further provides that OTS may, "through enforcement proceedings or otherwise," require any thrift that fails to meet any of its regulatory capital requirements to take one or more of the following corrective actions:

(a) increase the amount of its regulatory capital to a specified level or levels'
(b) convene a meeting or meetings with the OTS supervision staff for the purpose of accomplishing the objectives of this section;
(c) reduce the rate of earnings that may be paid on savings accounts;
(d) limit the receipt of deposits to those made to existing accounts;
(e) cease or limit the issuance of new accounts of any or all classes or categories, except in exchange for existing accounts;

(f) cease or limit lending or the making of a particular type or category of loan;
(g) cease or limit the purchase of loans or the making of specified other investments;
(h) limit operational expenditures to specified levels;
(i) increase liquid assets and maintain such increased liquidity at specified levels; or
(j) take such other action or actions as the Director may deem necessary or appropriate for the safety and soundness of the savings association, or depositors or investors in the savings association.

On or after January 1, 1991, these restrictions, "and any other restrictions the Director [of OTS] determines appropriate," may be included in a "capital directive" issued by the Director against a non-complying thrift. Finally, according to the OTS capital regulation, OTS must treat as an unsafe and unsound practice "any material failure by a savings association to comply with any plan, regulation, written agreement undertaken or order or directive issued to comply with the requirements of [the capital regulation]."

56. In "Thrift Bulletin 36," now effective, OTS specified that acceptance of a capital plan submitted by a non-complying thrift will be predicated on certain additional stringent conditions, including among others:

(a) The management and the board of directors must execute an operating agreement which may provide, among other things, that if specific targets within the plan are not met or the thrift takes any action that does not comport with the plan, certain activities will be

significantly restricted, a consent to merge agreement will be executed, or management and the board of directors will resign.
(b) The board of directors and senior management for the thrift must file an amendment, acceptable to the OTS District Director, to the capital plan within 15 days following an event or circumstance that materially affects the validity of the capital plan or its underlying assumptions. At a minimum, the capital plan must be reviewed and revised as necessary on an annual basis.
(c) The thrift must submit to the OTS District Director, within 20 days following the close of each calendar quarter, quarterly variance reports comparing actual capital to the targets established in the capital plan. Failure to file such variance reports shall constitute an unsafe and unsound practice. Variances that the District Director deems to be material may be grounds for revoking acceptance of the capital plan.

57. According to Thrift Bulletin 36, a thrift that fails to comply with any of its minimum capital requirements will be deemed to be in non-compliance upon "adoption" of the OTS capital regulation, rather than upon the rejection of any capital plan submitted by the thrift.

58. Thrift Bulletin 36 recognizes that, apart from the specific restrictions set forth in FIRREA and the OTS capital regulation, there are a significant number of related OTS regulations, rules, and policy statements that limit or restrict a variety of essential business activities (e.g., payment of dividends, establishment of branches, receipt of Federal Home Loan Bank advances, investments in securities and

real estate), by thrifts that do not meet minimum capital requirements. Thrift Bulletin 36 requires that thrifts "request and receive approval of specific, express exemptions" from the operation of such related regulations "as part of the capital plan to be deemed in capital compliance."

59. Because of the provisions of FIRREA and the OTS capital regulation excluding supervisory goodwill from capital for regulatory reporting purposes, United cannot currently satisfy the minimum capital requirements established by FIRREA and the OTS regulation and cannot come into compliance with such requirements in the foreseeable future.

COUNT I

60. Plaintiffs incorporate by reference paragraphs 1 through 59 above.

61. Winstar invested $2 million to acquire Windom in express reliance on the United States' agreement that, for regulatory purposes, the supervisory goodwill resulting from the acquisition of Windom was to be treated as an asset includable in the capital of United and amortized on a straight-line basis over a period not to exceed 35 years. Winstar later invested $800,000 in United in reliance on the same agreement. Also in reliance on the agreement, Winstar and United have operated and managed United since the merger, improving its financial position and greatly reducing the cost of liquidating United.

62. The United States has breached its contract with Winstar and United by refusing to allow United's supervisory goodwill to be treated as an asset included in the capital of that institution, and by refusing to allow that the supervisory goodwill be amortized over 35 years, for regulatory purposes.

63. Winstar and United are entitled to restitution in the amount of Winstar's investment of $2.8 million, plus the return of all benefits conferred upon the government through plaintiffs' purchase, operation, and management of Windom. Winstar and United currently estimate the value of such benefits, which is to be determined at trial, to exceed $1 million.

COUNT II

64. Plaintiffs incorporate by reference paragraphs 1 through 63 above.

65. The parties' agreement concerning the treatment of goodwill was an essential term and condition of the transaction, and was essential to the parties' purpose of allowing Winstar and United a reasonable opportunity to turn Windom from a failing institution into a profitable venture.

66. Winstar and United would not have agreed to acquire Windom in the absence of such accounting treatment, because United would have been left insolvent and because United would otherwise have been unable to manage itself without substantial regulatory oversight that would interfere with its business and prospects.

67. The parties to the transaction could not reasonably have foreseen that Congress would enact legislation that would be construed to extinguish Winstar and United's existing contract rights.

68. FIRREA's abrogation of the United States' contractual agreements renders United hopelessly insolvent, frustrates the entire purpose of Winstar and United's contract with the government for the acquisition of Windom, and deprives Winstar and United of the consideration for which they bargained.

69. Winstar and United are entitled to rescission of the transaction with the United States, and the return of Winstar's investment of $2.8 million, plus the return of all benefits conferred upon the government through plaintiffs' purchase, operation, and management of Windom. Winstar and United currently estimate the value of such benefits, which is to be determined at trial, to exceed $1 million.

COUNT III

70. Plaintiffs incorporate by reference paragraphs 1 through 69 above.

71. The provisions of FIRREA and the OTS capital regulation restricting the inclusion of United's supervisory goodwill for purposes of satisfying minimum capital requirements constitute a repudiation and abrogation of Winstar and United's contract rights, as described above, and effect a taking of Winstar and United's property without just compensation, in violation of the Fifth Amendment to the United States Constitution.

72. Winstar and United are entitled to just compensation in the amount of their investment of $2.8 million, plus the return of all benefits conferred upon the government through plaintiffs' purchase, operation, and management of Windom. Winstar and United currently estimate the value of such benefits, which is to be determined at trial, to exceed $1 million.

COUNT IV

73. Plaintiffs incorporate by reference paragraphs 1 through 72 above.

74. The provisions of FIRREA and the OTS capital regulation restricting the inclusion of United's supervisory goodwill in capital for purposes of satisfying the minimum capital requirements constitute a repudiation and abrogation of Winstar and United's contract rights, as described above, and effect a deprivation of Winstar and United's property without due process of law, in violation of the Fifth Amendment to the United States Constitution.

75. Winstar and United are entitled to monetary relief in the amount of their investment of $2.8 million, plus the return of all benefits conferred upon the government through plaintiffs' purchase, operation, and management of Windom. Winstar and United currently estimate the value of such benefits, which is to be determined at trial, to exceed $1 million.

PRAYER FOR RELIEF

WHEREFORE, Winstar and United respectfully pray:

(a) That the Court award Winstar and United monetary relief in the amount of their investment of $2.8 million, plus the value of all benefits conferred upon the government through plaintiffs' purchase, operation, and management of Windom. Winstar and United currently estimate the value of such benefits, which is to be determined at trial, to exceed $1 million;

(b) That the Court award Winstar and United their costs, attorney's fees, and interest allowed by law; and

(c) That the Court grant such other and further relief as the law and evidence may justify and as the Court may deem just and proper.

Respectfully submitted,

Robert R. Vieth

Attorney of Record for Plaintiffs
WINSTAR CORPORATION and
UNITED FEDERAL SAVINGS
BANK

Of Counsel:

Charles J. Cooper
Michael A. Carvin
McGUIRE, WOODS, BATTLE & BOOTHE
The Army & Navy Club Building
1627 Eye Street, N.W., Suite 1000
Washington, D.C. 20006
(202) 857-1700

Federal Home Loan Bank Board Memo
Federal Savings and Loan Insurance Corporation

Inter-Office Communication

DATE: March 14, 1984

SUBJECT: Viability Analysis
of Windom FS&LA,
Windom, MN
FHLBB No. 3058

FROM: Kevin Aucello
Financial Analyst, AED

TO: Bob Brick
Finanical Analuysis, MAD

I have performed a viability analysis regarding the proposed acquisition of the subject association by Windom Holding Company of Windom, Minnesota.

Relevant Assumptions

1. Balance sheet date as of January 31, 1984 and a ten year horizon was used for the analysis.

2. Purchase accounting is applied to the assets of Windom. The mortgage rate is 13.26%, the other loans rate is 13.13%. Goodwill is amortized over 40 years.

3. Cash up to the 5% of total assets will be invested at the average T-Bill rate. Cash above the 5% level will invested at a rate equal to the associations cost of money plus 250 basis points.

4. New mortgages earning the market rate will be made equal to 80% of available liquidity. Two points

will be taken into income for each dollar of mortgages originated. These mortgages will be ARMS with an assumed adjustment every five years.

5. The savings growth and future cost and investment assumptions are those contained in the January market standard market scenario.

6. The initial composite cost of money is 11.25%.

7. The operating expense ratio is 1.10%.

Acquirer Assistance:

1. The acquirer will make a cash contribution of $2,800,000 at the time of acquisition.

2. It is estimated that the resulting association will make dividend payments to the stockholders of:

Year:	1	2	3	4	5	6	7	8	9	10
$ of Net Income	50	60	70	60	50	50	50	50	50	50
$ in Thousands	0	140	150	150	160	250	340	450	560	690

FSLIC Assistance:

1. The FSLIC will make a cash contribution of $1,950,000 at the time of acquisition.

2. The FSLIC will infuse cash at the time of acquisition sufficient to bring net worth to zero.

Results: (000's omitted)

Year	*Total Assets*	*Net Worth*	*Net Income*	*WW/Assets (%)*
At Merger	$56,800	$4,290	$ —	7.6
1	61,990	2,830	(1,450)	4.6
2	67,650	2,920	90	4.3
3	72,990	2,990	70	4.1
4	77,980	3,090	100	4.0
5	83,620	3,250	160	3.9
6	90,510	3,490	250	3.9
7	98,040	3,840	340	3.9
8	106,270	4,280	450	4.0
9	115,260	4,850	560	4.2
10	125,070	5,540	690	4.4

McGladrey Hendrickson & Pullen
Certified Public Accountants

May 10, 1984

Mr. Harlan G. Halsne
Supervisory Agent
Federal Home Loan Bank Board
907 Walnut Street
Des Moines, Iowa 50309

RE: Accounting Treatment For the Merger of Windom Federal Savings and Loan Association into United Federal Savings Bank (an entity to be formed)

Dear Mr. Halsne:

As you are aware on May 3 and 4, 1984, Mr. E. Ted Yoch and Mr. Gregg Schneider, both of Rosewood Corporation, Mr. James Stephenson of the Faegre & Benson law firm in Minneapolis and myself met in Washington D.C. with members of the Federal Savings and Loan Insurance Corporation and the Office of the General Counsel.

During the meeting we discussed the fact that perhaps a better approach to the accounting treatment for the assistance from FSLIC could be utilized. It was felt that rather than recording the entire amount of the assistance as a permanent increase in the net worth of United Federal Savings Bank it might be better to split the assistance between net worth and a reduction in the recorded goodwill.

Accordingly, United Federal Savings Bank requests approval through this letter for recording the financial assistance received from the Federal Savings and

Loan Insurance Corporation at the date of acquisition in the following manner:

1. The amount of assistance applicable to specific scheduled loans in an amount totaling $1,950,000 to be recorded as a permanent increase in the net worth of United Federal Savings Bank.

2. The balance of the assistance which will be an amount equal to the negative net worth of Windom Federal Savings and Loan Association at the date of closing to be recorded as a reduction of the goodwill recorded in connection with the formation of United Federal Savings Bank.

If the accounting treatment requested herein is permitted, United Federal Savings Bank will have beginning net worth of $3,950,000 resulting from the $1,950,000 assistance from FSLIC and $2,000,000 injected by Winstar Corporation. This will mean that United Federal Savings Bank will begin its operations with an approximately 6.8% capital to asset ratio. It will also mean that the recorded goodwill at the date of acquisition will be reduced by the amount applicable to negative net worth which we estimate to be approximately $3,100,000, assuming that closing occurs prior to June 1, 1984. This will benefit United Federal Savings Bank's future operations since the amortization of the goodwill over the 35 year period will be reduced.

This request will modify the accounting treatment for the FSLIC assistance asked for in our letter dated December 6, 1983 to the attention of Ms. Margaret M. Meagher, which was signed by Duane D. Taut, Partner. All other matters in the December 6, 1983 letter will remain as stated. During our

discussion in Washington it was felt that this modification would hopefully not delay or present an impediment to the closing of this transaction at your earliest convenience. If you have any questions regarding this request, please do not hesitate to contact me.

Very truly yours,

Robert E. Hiller
Partner

Encl.

cc: Mr. L. Ted Yoch
Mr. Rohan J. Samaraweera
Mr. Alan Hawkins
Mr. Brian Vooght

Windom FS&LA
Windom, Minnesota
FHLBB No. 3058

May 29, 1984

FINANCIAL INFORMATION PRESENTATION

Summary of Cost Alternatives	*$ Cash Outlay*	*$ Present Value*
Liquidation	8,830,000	12,336,000
Winstar Corporation	5,211,000	5,211,000

Liquidation

Liquidation Assumptions

1. Insured Savings	$43,368,000
2. Uninsured Savings	789,000
3. Number of Insured Accounts	7,965
4. Insurance Cost Per Account	$25
5. Receivership Life	3 year
6. FSLIC Opportunity Cost	10,28%
7. Assets as of 1/31/84	49,200,000
8. Net Worth as of 1/31/84	(3,061,037)
9. Mortgage Market Yield	14.73%

Cost of Liquidation	*$ Net Cash Outlay*	*$ Present Value*
Payout Insured	$43,368,000	$43,368,000
Insurance Payment Cost	199,000	199,000
Total Cash Outflow	43,567,000	43,567,000
Recovery from Receivership	34,737,000	31,231,000
Total Cost to FSLIC	8,830,000	12,336,000

Windom FS&LA
Windom, Minnesota
FHLBB No. 3058

Costing Sheet
($000)

Proposal of Bidder: Winstar Corporation

Date Prepared: May 29, 1984

AED Analyst: Nancy Schaen
MAD Analyst: Bob Brick

Assistance:

1. The FSLIC will make a cash contribution of $1,950 at the time of acquisition.

2. FSLIC will infuse cash at the time of acquisition sufficient to cover Windom's negative net worth. (Net worth as of 4/30/84 equals –3,061 plus $200 for anticipated losses for two months to follow).

3. The acquirer will make a cash contribution of $2,000 at the time of acquisition.

4. It is estimated that the resulting association will make dividend payments to the acquiring stockholders of:

Year:	1	2	3	4	5	6	7	8	9	10
$ of Net Income	50	60	70	60	50	50	50	50	50	50
$ in Thousands	240	300	410	420	430	590	770	970	1220	1490

Data for: April 1984 Scenario: April 1984

Cost of Proposal:	*$ Net Cash Outlay*	*$ Present Value*
Cash Contribution	1,950	1,950
Negative Net Worth	3,261	3,261
Total Cost to FSLIC	5,211	5,211

Federal Home Loan Bank Board Memo
Federal Savings and Loan Insurance Corporation

Inter-Office Communication

DATE: May 30, 1984

SUBJECT: Windom FS&LA
Windom, MN
FHLBB No. 3058

FROM: Nancy Schaen
Financial Analyst, AED

TO: Bob Brick
Financial Analyst, MAD

Per your request I have performed a viability analysis regarding the proposed acquisition of the subject association by Winstar Corporation, a unitary holding company in Windom, Minnesota.

Relevant Assumptions

1. Balance sheet data as of April 30, 1984 was used as well as up-to-date costs and yields for the association.
2. The mortgage discount rate at the time of the analysis is 14.73%.
3. The April 1984 standard market rate scenario and a ten year horizon were used for the analysis.
4. Goodwill is amortized over 35 years.
5. As per Winstar's business plan, it was assumed the association will immediately sell $24,800 of their original mortgage portfolio and reinvest at higher yields.

Acquirer Assistance

1. The acquirer will make a cash contribution of $2,000,000 at the time of acquisition.
2. It is estimated that the resulting association will make dividend payments to the acquiring stockholders of:

Year:	1	2	3	4	5	6	7	8	9	10
$ of Net Income	50	60	70	60	50	50	50	50	50	50
$ in Thousands	240	300	410	420	430	590	770	970	1220	1490

FSLIC Assistance

1. The FSLIC will make a cash contribution of $1,950,000 at the time of acquisition.
2. The FSLIC will infuse cash at closing sufficient to cover Windom's negative net worth.

Viability Results

1. Total assets of Windom FS&LA as of 4/30/84 equal $49,200,000.
2. Net income remains positive over the life of the analysis.
3. New worth remains positive over the life of the analysis.
4. The total assets, net worth, net income, and net worth to total liabilities figures are as follows:

($000 Omitted)

Year	*Total Assets*	*Net Worth*	*Net Income*	*Net Worth/ Total Liabilities %*
0	55,030	3,950	—	7.73
1	61,020	4,190	240	7.37
2	67,260	4,380	200	6.97
3	73,230	4,560	180	6.64
4	79,110	4,840	280	6.52
5	85,650	5,270	430	6.56
6	92,840	5,860	590	6.74
7	100,760	6,630	770	7.04
8	109,470	7,600	970	7.46
9	119,070	8,820	1,220	8.00
10	129,620	10,310	1,490	8.64

Federal Home Loan Bank Board — Memo
Office of Examinations and Supervision

Inter-Office Communication

DATE: June 1, 1984

SUBJECT: Windom FS&LA
Windom, MN
FHLBB No. 3058
FSLIC-Assisted
Conversion to a FSB,
and Acquisition by
Winstar, a Holding Company

FROM: Robert J. Moore

TO: Joseph M. Arendes
Assistant Director

We have reviewed the materials forwarded with your memo of February 17, 1984 relative to the subject FSLIC-assisted conversion and acquisition.

We concur with the opinion of the independent public accounting firm, McGladrey, Hendrickson & Co. (now McGladrey, Hendrickson & Pullen) that the purchase method of accounting is appropriate for the acquisition of Windom.

Further, we have no objection to the accounting forbearance outlined for purposes of reports to the FHLBB.

Deputy Director
Program/Administration

OES:TH:njw

FEDERAL HOME LOAN BANK BOARD

Office of Supervisory Agent • Eighth District

MEMORANDUM

DATE: June 28, 1984

TO: J.J. Finn
Secretary to the Board

FROM: Harlan G. Halsne
Supervisory Agent

SUBJECT: *S-Memorandum—Proposed Supervisory Conversion of:*

Windom FS&LA
Windom, Minnesota
Docket No. 3058

from the Federal Mutual to Federal Stock Savings Bank Form of Organization

The Merger of Windom FS&LA

with

United Federal Savings Bank, a de novo stock saving bank wholly-owned by:

Winstar Corporation, a newly formed holding company

I. *Proposal*

Winstar Corporation (Winstar), a newly formed Minnesota Corporation, proposes to acquire Windom Federal Savings and Loan Association,

Windom, Minnesota (Windom). The transaction will involve the supervisory conversion of Windom Federal Savings and Loan Association from a federally-chartered mutual savings and loan association to a federally-chartered stock savings bank. Following the conversion, Windom Federal Savings and Loan Association will be merged with United Federal Savings Bank (United FSB), a de novo wholly-owned subsidiary of Winstar.

The Office of Examinations and Supervision (OES) has no supervisory objection to this proposal. The remainder of this memorandum will discuss its financial and supervisory aspects.

II. *Condition of Failing Association—Windom FS&LA*

As of April 30, 1984, Windom's assets totalled $49.2 million, with a deficit net worth of $3.1 million. Insolvency resulted from both substantial operating losses and substantial actual or indicated losses on loans and real estate owned. Operating losses were incurred during the past several years due to (1) increased cost of savings resulting from a shift in savings capital to higher rate accounts; (2) excessive levels of borrowed money resulting from the need to fund nationwide loan participation commitments; and (3) falling yields resulting from high levels of non- or low-earning assets. Actual or indicated losses on loans and real estate owned were incurred or recognized over the past several rears primarily as a result of deficient underwriting of major nationwide participation loans. The following table summarizes Windom's relevant financial history:

SEMIANNUAL DATA
(in thousands)

	Quarterly Period Ended (in thousands)	Semiannual Periods Ended (in thousands)				
	3-31-84	12-31-83	6-30-83	12-31-82	6-30-82	12-31-81
Assets	$47,711	$49,367	$49,176	$49,724	$49,552	$46,765
Net Worth	$(2,963)	$(2,635)	$(1,648)	$442	$1,161	$1,327
Net Woth/Assets	(6.2%)	(5.4%)	(3.3%)	.9%	2.3%	2.8%
Yield on Investments	10.1%	10.0%	10.8%	11.2%	12.4%	12.4%
Cost of Money	10.6%	11.3%	11.0%	12.3%	12.4%	11.7%
Spread	(.5%)	(1.3%)	(.2%)	(.9%)	0	.7%
Net Income	$(328)	$(987)	$(2,090)	$(719)	$(166)	$(11)
Savings	$44,514	$43,870	$42,085	$36,964	$35,366	$33,937
Advances and Borrowed Money	$6,000	$7,000	$8,600	$12,205	$12,746	$11,157
Specific Reserves:						
Repossessed Property	$1,290	$1,290	$1,130	0	0	0
Mortgage Loans	$162	$133	$370	0	0	0
Scheduled Items/ Assets	NA	5.8%	7.0%	8.4%	5.1%	3.4%

Windom's existing problem assets are briefly summarized as follows:

A. Perkins Road Development, Inc.—122 Unit Ramada Inn—Stillwater, Oklahoma—Loan to Facilitate Sale of Real Estate Owned

Perkins Road Development, Inc. (Perkins) was formed by Windom and three other original loan participants to dispose of a 122 unit motel acquired by deed in lieu of foreclosure. Perkins sold the property in 1982. The sale involved below market rate financing, deferred equity contributions and other favorable terms. As of December 31, 1983, Perkins' investments totalled $3,908,959. Windom's share equals $1,200,113. There is no current appraisal of this property. As of June 1, 1984, payments were $245,000 in arrears. The buyers have invested $510,000 equity in the project.

B. Carson, Inc.—Macienda Taos—13 Unit Condominium Project—Taos, New Mexico—Real Estate Owned

Carson, Inc. was formed by Windom and six other original loan participants to complete and market a 13 unit condominium acquired by deed in lieu of foreclosure. Total investment in this project as of July 31, 1983 totalled $4,681,676. A May, 1983 appraisal estimated value at $1,750,000 indicating a $2,931,575 loss. Windom's share of this loss equals $1,064,187. A specific reserve was established in this amount in June, 1983.

C. Tonapah, Nevada—30 Townhouses—Real Estate Owned

This property was acquired by deed in lieu of foreclosure in October, 1982. The association's 75 percent interest totalled $1,217,378 as of July 31, 1983. The most recent appraisal indicated a loss of $159,878 for Windom. A specific reserve was established in this amount in September, 1983.

D. Other Major Scheduled Loans

Windom's interest in five (5) other major scheduled loans and real estate owned totalled $1,926,781 as of July 31, 1983. Appraisals indicated losses totalling $74,880 on two of the projects. Specific reserves have been established in the amount of $66,200.

III. *Condition of Industry in Des Moines Bank District*

There are 199 insured institutions in the Eighth FHLBB District. Assets of these insured institutions totalled $43.6 billion as of March 31, 1984.

As of March 31, 1984, OES projects that eight (8) Eighth District insured institutions, representing assets of .8 billion dollars of 1.8 percent of total Eighth District insured assets, will be insolvent within the next twelve months.

IV. *Supervisory History*

Primary supervisory concerns in Windom's most recent regular and special examination reports

were directed to (a) poor operating results and net worth position and (b) serious nationwide participation loan underwriting deficiencies which resulted in indicated losses and high levels of low- and non-earning assets. The need for close monitoring became apparent in December, 1981 when a regular examination first disclosed large increases in scheduled items and numerous participation loan underwriting deficiencies. A subsequent follow-up examination conducted in July, 1982 disclosed the possibility of significant indicated losses and a rapidly declining net worth position. Upon receipt of this follow-up report, supervision immediately arranged a meeting with Windom's Board. The discussion at the meeting focused on the possibility of Windom's continued existence in light of operating results and possible indicated losses. The association did not agree that the indicated losses were warranted. They were given until December, 1982 to support their contention. The Board was apprised of what actions would be necessary should the association's position continue to deteriorate. It was suggested that the Board begin to consider all options.

The next development took place in January, 1983 when a review of the December, 1982 monthly report disclosed significantly greater operating losses than anticipated and a consequent potential for insolvency by March, 1983. When contacted, management indicated that the December results were due to extraordinary adjustments and that 1983 losses would be manageable. In early 1983, Supervision assisted Windom's attempt to obtain net worth certificates. However, during March, 1983, it was determined that insolvency could not be avoided even with net worth certificates.

Operations had continued to decline, and the receipt of appraisals confirmed the existence of indicated losses on association real estate owned and participation loans. The association became insolvent in March, 1983 upon the establishment of certain requested specific reserves. Windom's Board signed a Consent Resolution on March 11, 1983. The resolution provided, among other things, that the FSLIC and Supervision could negotiate for Windom, and that the Windom Board would approve any resulting plan of merger, consolidation, or transfer of assets and liabilities. Supervision worked towards an unassisted merger until additional indicated losses on association assets made such a solution impossible.

The following table provides information regarding Windom's recent examination report ratings:

Date	*Exam Type*	*Composite Evaluation*	*CRA Evaluation*
8-15-83	Special Limited	40	3
2-24-83	Supervisory	40	3
7-29-82	Special Limited	NA	NA
12-07-81	Supervisory	20	3

Since the Special Limited Examination dated August 16, 1983, Windom has continued to incur substantial operating losses primarily as a result of high levels of low- and non-earning assets and the continued shift in savings capital to higher rate accounts.

V. *Pledged Accounts*

There are no pledged accounts at Windom.

VI. *Condition of Acquirer—Winstar Corporation, Roseville, Minnesota*

A. *General*

Winstar Corporation is a newly formed corporation, which, if its application for acquisition of Windom is approved, will become a holding company. Winstar will be capitalized with $2,250,000 in cash, of which $1,750,000 will be borrowed from Norwest Bank, Minneapolis. The balance of $500,000 will be contributed by the five principals. The $1,750,000 to be borrowed from Norwest will be secured by 100 percent of the capital stock of United FSB issued at the time of its organization. Winstar principals will personally guarantee $500,000 of this debt. Interest will be at prime plus 1 percent, adjustable annually. Repayment will be according to a "Minimum Principal Debt Reduction Schedule". (See Exhibit S-14). Norwest reserves the right to alter the terms and conditions of the credit at each annual renewal.

Winstar will initially capitalize United FSB by purchasing its stock for $2,000,000 cash.

Winstar will pay a $100,000 brokerage fee to Newlin Bank Sales in connection with the acquisition of Windom. The fee, at 5 percent of sales price, involves an assumption by Winstar of a finder's fee obligation of Douglas Kratz. Kratz's obligation arose out of a written agreement between Newlin Bank Sales and himself to pay a 5 percent sales price finder's fee upon the consumation of any purchase of any institutions brokered by Newlin Bank

Sales. Newlin Bank Sales had originally presented the Windom opportunity to Kratz. Kratz would have been obligated to pay the fee upon consumation of purchase. Kratz, however, chose not to pursue this investment. Kratz presented the Windom opportunity to the organizers of Winstar on the condition that if the transaction was consumated, Winstar would pay the $100,000 Newlin fee, plus a $15,000 fee to Kratz. These fees will be paid entirely from Winstar funds. No fees will be paid from FSLIC funds infused into the institution as FSLIC assistance. We have no objection to the payment of these fees.

The five (5) principals of Winstar have a combined net worth exceeding 14 million dollars. This amount consists primarily of real estate equities and stock in closely-held corporations. The corporations are involved in mortgage banking activities and in real estate management, finance, development, and syndication. Net worth of the principals are thus concentrated in non-liquid real estate and real estate related investments. Net income of the principals ranged from $82,000 to $131,750 and aggregated $505,000 in 1983.

One of the principals of Winstar, E. Ted Yoch, was director of Northern Federal Savings and Loan Association, Minneapolis, Minnesota, from 1978 to 1981. Northern was the subject of a supervisory merger in 1983. Mr. Yoch's selection as a director was pursuant to a supervisory request that Northern replace certain board members with outsiders. The selection of Mr. Yoch was approved by Supervision. We have no objection to Mr. Yoch as a principal in the acquisition of Windom.

B. *Business Plan*
Winstar has prepared a comprehensive business plan for United FSB. (See Exhibit S-13). The plan meets the content requirements of SP-35, and appears to present a reasonable formula for the initial operation of United FSB. We have no supervisory objection to the business plan. In addition to reviewing the business plan, we have reviewed the viability analysis prepared by the Analysis and Evaluations Division FSLIC. In our opinion, the association will be viable following conversion.

C. *Holding Company Act Standards*
We find no statutory basis for disapproval of the application of Winstar for approval to become a savings and loan holding company through its acquisition and control of Windom. Pursuant to Section 584.4(c) of the Holding Company Regulations, this office, in conjunction with the Office of the FLIC, has reviewed the financial and managerial resources and future prospects of Winstar. We have no reason to believe that the proposed acquisition of Windom would be deterimental to the savings accountholders of Windom or the insurance risk of FSLIC.

D. *Change of Control Issues*
Winstar is a *de novo* holding company. There are no change of control issues or requirements in connection with this proposal.

E. *Community Revinvestment Act*
Windom's recent examination reports indicate satisfactory CRA ratings. The business plan prepared by Winstar for United FSB appears

to establish community reinvestment goals and policies which would, if adhered to, provide continued CRA compliance.

VII. *Personnel Issues*

Winstar proposes to retain an advisory board at the Windom United FSB office to consist of John Gelle, Ted M. Weeks, August W. Lerner, Roger L. Benson, J.A. Dick and Frank C. Jungas, all current Windom Board members. The advisory board will meet monthly. Each member will receive $100 per meeting attended. The advisory board's responsibilities will be to generate goodwill and new business, participate in planning meetings, and give advice on borrower credit worthiness, marketing strategy and history of troubled loans. Each member will serve at the pleasure of the Board of United FSB.

The principal managment change will be the addition of Thomas C. Daniel as Chief Executive Officer of United FSB. Winstar entered into an employment contract with Mr. Daniel on June 1, 1984. (See Exhibit S-9(e). We have reviewed this contract and find that it conforms to the requirements of Sections 563.39 and 571.5(d)(4) of the Insurance Regulations, and Section 545.122 of the Federal Regulations. Mr. Daniel apparently has 12 years experience in various phases of finance and banking. We have no objection to the selection of Mr. Daniel as Chief Executive Officer of the proposed United FSB.

FSLIC has agreed to allow United FSB to be governed by a Board of Directors of between 6 and 15 members. This is below the

standard seven (7) member minimum charter requirement of Section 552.3. We have no objection.

VIII. *Stipulations*

A. *Requested Dividend Restriction Waiver*

Winstar has requested that United FSB be allowed to pay dividends from available net income as follows:

1984	50%
1985	50%
1986	60%
1987	70%
1988	60%
1989 and after	50%

The Analysis and Evaluations Division of FSLIC has estimated that with the requested dividend restriction waiver, the dividends from United FSB wil permit Winstar to meet its debt service requirements. FSLIC has agreed to the requested dividend forbearance. We have no objection to this request. We recommend that the Resolution limit payment of dividends to 50 percent of available net income, but that the limitation be waived during the years and for the percentages requested by Winstar. The forbearance letter attached at Exhibit S-12, provides the waiver of the dividend restriction for the years requested by Winstar.

B. *Net Worth Maintenance Restriction*

We recommend that Winstar be required to maintain net worth at the level required by Section 563.13(b) of the Insurance Regulations

for institutions insured 20 years or more without regard to any net worth assistance for which United FSB may qualify, and to infuse additional equity if necessary. We also recommend that United FSB be required to waive any right to net worth assistance under the net worth certificate program.

C. *Stock Issuance and Transfer Restriction*

We recommend that Winstar and United FSB be required to stipulate to certain stock issuance and transfer restrictions. Specifically, that, for the term of the Assistance Agreement or three years from the date of the merger, whichever is longer:

1. Winstar stipulates to maintain control over United FSB and to not sell, pledge (except as security for initial acquisitions to Norwest Bank, Minneapolis, Minnesota), transfer, or otherwise dispose of United FSB stock, unless the Corporation gives its written consent.

2. United FSB stipulates that it will not issue stock, stock options or warrants to any person other than Winstar without the Corporation's written consent.

X. *Accounting Issues*

The independent accounting fire of McGladrey, Hendrickson and Company stated in a December 6, 1983 letter to FSLIC that the proposed acquisition requires the use of the purchase method of accounting, and that loan discounts and intangible asets will be amortized under regulatory accounting principles.

In a letter dated June 1, 1984 to Regional Director Arendes, Deputy Director Moore stated that purchase accounting was appropriate for the transaction.

XI. *Service Corporation Issues*

There are no service corporation issues. The association wholly-owns Azure, Inc., and partially owns two other service corporations. The activities of these three corporations are limited to the salvage of Windom problem assets.

III. *Forbearances*

In addition to their request for a waiver of the dividend restrictions for 1986, 1987 and 1988 as discussed above, United FSB has requested three standard forbearances presently approved by the Bank Board in connection with supervisory mergers. A copy of the forbearance language is attached at Exhibit S-12. We have no objection to the granting of these additional forbearances.

/s/ Harlan G. Halsne
HARLAN G. HALSNE
Supervisory Agent

Enclosures

I concur:

/s/ Joseph M. Arendes
JOSEPH M. ARENDES
Assistant Director for Regional Operations

I concur:

/s/ William J. Schilling
WILLIAM J. SCHILLING
Director, OES

FEDERAL HOME LOAN BANK BOARD

To all to whom these presents shall come, Greeting:

I CERTIFY that hereto annexed are true copies of documents described below made from records of the Federal Home Loan Bank Board, which records are in the official custody of the Secretary to said Board and are on file in its offices at 1700 G Street, Northwest, Washington in the District of Columbia, to wit:

Copy of Resolution No. 84-363, adopted by the Federal Home Loan Bank Board on July 6, 1984.

In testimony whereof, J.J. Finn Secretary to the Federal Home Loan Bank Boad have hereunto caused the Seal of said Board to be affixed and my name subscribed hereto, in the District of Columbia, this 6th day of July, 1984

/s/ JJ. Finn
Secretary to the
Federal Home Loan Bank Board

THIS PAGE INTENTIONALLY LEFT BLANK

THIS PAGE INTENTIONALLY LEFT BLANK

FEDERAL HOME LOAN BANK BOARD

Acquisition of Windom Federal Savings and Loan Association
No. 84-363
Date: July 6, 1984

Recitals

WHEREAS, the board of directors of Windom Federal Savings and Loan Association, Windom, Minnesota ("Windom"), has adopted, by at least a two-thirds vote of the board, a plan of merger evidenced by a Combination Agreement and Plan of Merger ("Merger Agreement") (a copy of which is in the Minute Exhibit File), pursuant to which Windom will merge with and into United Federal Savings Bank, ("Savings Bank"), a proposed federal stock savings bank; and

WHEREAS, Winstar Corporation, a Minnesota corporation ("Winstar" or "Applicant"), has applied to the Federal Savings and Loan Insurance Corporation ("FSLIC"), pursuant to § 408 of the National Housing Act, as amended, (the "Act"), 12 U.S.C. § 1730 (1982), for prior written approval to acquire control of Windom through the merger of Windom with and into Savings Bank, a proposed federal stock savings bank to be organized pursuant to § 5(p) of the Home Owners' Loan Act of 1933, as amended, ("HOLA"), 12 U.S.C. § 1464(p) (1982), the stock of which is to be purchased and held by Winstar, and the Federal Home Loan Bank Board ("Bank Board"), as operating head of the FSLIC, has considered the Holding Company Application and accompanying materials of Applicant (hereafter referred to as the "Application"); and

WHEREAS, Applicant, as the organizer of Savings Bank, has applied to the Bank Board for approval of the merger of Windom into Savings Bank ("Merger"); and

WHEREAS, The acquisition by Applicant of control of Windom and its successor Savings Bank ("Acquisition") and the Merger are conditioned upon the execution of an Assistance Agreement by and among Winstar, Savings Bank, and the FSLIC, under which the FSLIC will provide certain financial assistance and indemnification to Savings Bank to facilitate the Merger; and

WHEREAS, The Bank Board has considered proposed forms of the following documents: Plan of Organization, Application for Insurance of Accounts, Agreement for Operating Policies, Federal Stock Charter, Bylaws, Stockholders' Consent to Action, Directors' Consent to Action, Directors' Resolutions, Stock Certificate, Combination Agreement and Plan of Merger, Assistance Agreement, Net Worth Maintenance Stipulation, Stock Transfer Stipulation, Stock Issuance Stipulation, Dividend Limitation Stipulation, Stipulation of Affiliate Status, and Stipulation restricting Securities Brokerage Activities; and

WHEREAS, The Bank Board has considered memoranda from its Office of Examinations and Supervision ("S-Memo"), dated June 28, 1984, Office of the Federal Savings and Loan Insurance Corporation ("A-Memo"), dated June 29, 1984, and Office of General Counsel ("L-Memo"), dated July 3, 1984, together with accompanying attachments and exhibits (copies of which memoranda are in the Minute Exhibit File), with respect to Windom:

Review of Record and Proceedings

NOW, THEREFORE, IT IS RESOLVED That the Bank Board has reviewed, and considered the record before it regarding the financial condition of Windom and the proposed Acquisition transaction; and

Exercise of Authority under § 5(p) of the HOLA

RESOLVED FURTHER, That the Bank Board deems and finds that:

(1) Pursuant to approvals given in this resolution for the provision of assistance to facilitate the merger of Windom with Savings Bank, for the purposes of § 5(p) of the HOLA, the FSLIC has contracted to provide assistance to Windom under § 406(f) of the Act; and
(2) Severe financial conditions exist which threaten the stability of Windom, and authorization of the chartering of Savings Bank and the Merger of Windom into Savings Bank is likely to improve the financial condition of Windom; and
(3) The Bank Board may authorize or require the chartering of Savings Bank and the Merger pursuant to § 5(p) of the HOLA; and

Chartering of New Federal Stock Association

RESOLVED FURTHER, That under the authority of § 5(p) of the HOLA, and as part of a plan to prevent the failure of Windom, pursuant to a proposal by the FSLIC, the organization and incorporation of Savings Bank as a new federal stock savings bank, in accordance with the proposed Plan of Organization and attached documents, is hereby approved, *provided* that:

1. Applicant shall authorize the execution of all documents necessary to consummate such transactions in accordance with all applicable statutory and regulatory requirements, and the conditions imposed by this Resolution;
2. Applicant, shall, on or before the effective date of the Merger, submit to the FSLIC an executed Plan of Organization in the form, or substantially in the form, of the proposed Plan of Organization;
3. The issuance and sale of Savings Bank's stock to Winstar in accordance with the terms of the proposed Plan of Organization as executed shall be completed promptly upon the issuance of a Federal Stock Charter to Savings Bank;
4. The stock issued by Savings Bank shall be evidenced by a certificate in the form of the proposed certificate, which is hereby approved, including a statement to the effect that the shares are restricted as to transfer until the expiration of the longer of the proposed Assistance Agreement or three full years following the Merger, except with prior written consent of the FSLIC;
5. Winstar shall, promptly after it has made full payment for Savings Bank's stock, elect Savings Bank's board of directors, and the board of directors shall, promptly after being elected, appoint officers, approve the Merger and execution of the Merger Agreement on behalf of Savings Bank, and approve the execution of an assistance agreement with the FSLIC, and take all other actions necessary to effect the organization of Savings and the Merger;
6. The chief executive officer of the Applicant or other officer authorized to act for the Applicant

shall submit to the Bank Board, on behalf of the Applicant, promptly after completion of the acquisition of Savings Bank's stock, a letter stating that the purchase was made solely for the purpose of investment and not with a view toward resale or distribution; that the Applicant was provided with all material information requested concerning Windom and the Acquisition; that at the time of consummation of the Acquisition no material adverse change had occurred with respect to the business and operations of the Applicant since the date of the financial statements submitted with the Application; that the acquisition was consummated consistent with the pro forma statements of condition filed with the Application, or if any such change has occurred, stating in which respect there has been such a change or inconsistency with such statements of condition; that no expense has been incurred by Applicant in organization that is chargeable to Savings Bank and no such expense will be incurred; and that no funds were accepted for deposit by Savings Bank until organization of Savings Bank was completed in accordance with the Plan of Organization as executed and the terms of this resolution;

7. Savings Bank shall promptly file with the Bank Board a copy of the Plan of Organization on which its President shall have certified to the completion of the steps of organization as described therein;
8. Savings Bank shall promptly file with the Bank Board five copies of its charter and bylaws in the forms herein approved;
9. Savings Bank shall promptly file a Stock Issuance Stipulation with the Bank Board

stipulating that, for the longer of the term of the Assistance Agreement or three full years following the Merger, no voting stock, voting stock options, or warrants for voting stock shall be issued to any person or entity other than Winstar, or a direct or indirect wholly-owned subsidiary thereof, without the prior written approval of the FSLIC; and

10. Savings Bank shall promptly file with the Supervisory Agent an Agreement for Operating Policies in the form submitted to the Bank Board or in substantially similar form; and

Provided further, that if the above conditions are not met:

1. The Federal Stock Charter of Savings Bank shall be cancelled and withdrawn and its corporate existence shall then be terminated;
2. All approvals given under this Resolution and concurrent resolutions shall be cancelled and withdrawn; and
3. The membership of Savings Bank in the Federal Home Loan Bank of Des Moines ("Des Moines Bank") and the insurance of accounts by the FSLIC shall be cancelled and withdrawn by reason of failure to meet a condition; and

The Director, Deputy Director, or Associate Director, Office of the FSLIC, or any person designated in writing by any of the foregoing (hereafter referred to as "Director"), the General Counsel, and the Secretary or an Acting or Assistant Secretary to the Bank Board are authorized and directed to take all necessary and appropriate actions to effect the foregoing provisions of this resolving paragraph of this Resolution; and

Issuance of Forms

RESOLVED FURTHER, That all forms issued after the completion of the organization of Savings Bank evidencing funds on deposit with Savings Bank shall be in the form approved by the Principal or other Supervisory Agent of the Bank Board or the FSLIC, Des Moines, Iowa ("Supervisory Agent"), and shall indicate that Savings Bank is a stock savings bank; and

Issuance of Charter and Bylaws

RESOLVED FURTHER, That a Charter in the form of the proposed Federal Stock Charter is hereby approved and shall be issued to Savings Bank, and the Secretary or an Assistant Secretary may attest and date the Charter, upon the direction of the Office of the General Counsel, and such Charter shall be deemed issued at the time of such dating and attesting by the Secretary or Assistant Secretary; and

RESOLVED FURTHER, That the bylaws of Savings Bank in the form proposed are hereby approved; and

Completion of Organization

RESOLVED FURTHER, That, pursuant to § 552.2-3 of the Federal Regulations, the organization of Savings Bank shall be deemed complete when all actions provided for in paragraphs (A) through (O) of the Plan of Organization have been taken and the Assistance Agreement has been executed on behalf of the FSLIC; and

Membership in the Federal Home Loan Bank and FSLIC Insurance of Accounts

RESOLVED FURTHER, That upon receipt of its Charter, Savings Bank shall be a member of the Des Moines Bank and the Secretary or an Assistant Secretary shall issue a certificate of bank membership to Savings Bank; and

RESOLVED FURTHER, That insurance of accounts of Savings Bank is hereby approved, and the Secretary or an Assistant Secretary is authorized to issue a certificate of insurance to Savings Bank, and the FSLIC admission fee is waived, and the initial premium, if any, shall be paid upon determination by the Director, Office of the FSLIC, *provided* that the proposed Application for Insurance of Accounts and Agreement for Operating Policies are executed by Savings Bank in accordance with the Plan of Organization and returned to the FSLIC; and

Further Actions

RESOLVED FURTHER, That the Director, the General Counsel, and the Secretary or an Acting or Assistant Secretary to the Bank Board are hereby authorized and directed to take all other actions necessary or appropriate to further document or implement the incorporation and organization of Savings Bank, its membership in the Des Moines Bank, its insurance of accounts or any related matter contemplated in this resolution; and

RESOLVED FURTHER, That any documents necessary to the organization of Savings Bank as approved in this Resolution shall be executed in the form or

substantially in the form of the proposed documents presented to the Bank Board, *provided* that the Director, with the concurrence of the Office of Examinations and Supervision, may agree to such changes as do not involve matters of policy, and *provided further* that the final form of any such document has been approved by the Office of General Counsel; and

Supervisory Conversion

RESOLVED FURTHER, That the Bank Board, as operating head of the FSLIC, finds that:

(1) Windom is insolvent in that its assets are less than its obligations to creditors and others, including its members;
(2) The Bank Board has the power to appoint a receiver for the purpose of liquidating Windom;
(3) Upon the liquidation of Windom, accompanied by the payment of insurance on accounts, the members of Windom would have no realizable equity interest in Windom;
(4) Pursuant to this Resolution, the FSLIC has contracted to provide assistance to Windom under section 406 of the Act;
(5) Severe financial conditions exist which threaten the financial condition of Windom, and authorization of the supervisory merger conversion of Windom is likely to improve its financial condition;
(6) Following the merger conversion of Windom, the resulting association will be a viable entity;
(7) The conversion to stock form as part of the supervisory merger of Windom into Savings Bank is part of a supervisory transaction, and

may be and is hereby approved under § 5(i) of the HOLA, 12 U.S.C. § 1464(i) (1982), § 5(p) of the HOLA, 12 U.S.C. § 1464(p) (1982), and § 402(j) of the Act, 12 U.S.C. 1725(j) (1982); and

(8) Pursuant to the exception provisions in § 563b.1(a) and § 563b.20 of the Rules and Regulations for the FSLIC ("Insurance Regulations"), the rules set forth in Part 563b of the Insurance Regulations shall not govern the conversion of Windom; and

Approval of Combination Agreement and Plan of Merger

RESOLVED FURTHER, That the merger of Windom into Savings Bank and the resulting increase in the insurable accounts of Savings Bank are hereby approved pursuant to § 5(p) of the HOLA, §§ 546.2 and 552.13 of the Federal Regulations, and § 563.22 of the Insurance Regulations, and notwithstanding any provision of §§ 546.2 or 552.13 of the Federal Regulations and § 563.22 of the Insurance Regulations, (i) Savings Bank may enter into a Plan of Merger in the form or substantially in the form of the proposed Merger Agreement with Windom, (ii) the application for approval of the Merger is determined to be complete and in acceptable form; and (iii) the Director, with the concurrence of the Office of the General Counsel, may waive any provisions of §§ 546.2 or 552.13 of the Federal Regulations and § 563.22 of the Insurance Regulations not otherwise waived in this Resolution as the Director determines appropriate or necessary, *provided* that:

(1) Windom and Savings Bank shall have executed a Merger Agreement in the form or substantially in the form of the proposed Merger

Agreement, and the Office of the General Counsel shall have determined that such action has been taken;

(2) On or before the Effective Date of Merger, Applicant and Savings Bank shall file with the Bank Board a certification, in form and substance satisfactory to the Office of General Counsel, stating that none of the directors of the Applicant, Savings Bank, or Windom have received or will receive any payment, compensation, or inducement in connection with the Merger; and

(3) Upon consummation of the Merger, Applicant and Savings Bank shall submit a certification to the FSLIC and the Supervisory Agent stating the date on which the Merger became effective; and

RESOLVED FURTHER, That the Bank Board deems it necessary, in order to avert the imminent failure of Windom, to waive or deem inapplicable certain provisions of § 552.13 of the Federal Regulations, and hereby deems inapplicable and waives paragraphs (f), (i), (l) and (m) of § 552.13; and

RESOLVED FURTHER, That the Bank Board deems the Merger Agreement between Windom and Savings Bank and the application for approval of the merger to be in substantial compliance with § 546.2 and paragraphs (g) and (h) of § 552.13 of the Federal Regulations; and

RESOLVED FURTHER, That for purposes of determining its required net worth level under § 563.13(b) of the Insurance Regulations following the Merger, Savings Bank shall be treated as an institution insured for 20 years or longer; and

Accounting

RESOLVED FURTHER, That in accounting for the Merger and the acquisition of assets and liabilities of Windom by Savings Bank, Savings Bank and the Applicant shall use generally accepted accounting principles prevailing in the savings and loan industry, as accepted, modified, clarified or interpreted by applicable regulations of the Bank Board and the FSLIC; and

RESOLVED FURTHER, That Savings Bank shall furnish an analysis, accompanied by a concurring opinion from its independent public accountants, satisfactory to the Supervisory Agent and to the Office of Examinations and Supervision, which (i) specifically describes as of the closing date, any intangible assets, including goodwill or the discounts and premiums arising from the acquisition to be recorded on Savings Bank's consolidated books; and (ii) substantiates the reasonableness and conformity with regulatory requirements of the amounts attributed to intangible assets, including goodwill, and the discounts and premiums and the related amortization periods and methods; and

Prevention of Failure

RESOLVED FURTHER, That the Bank Board finds that approval of the Merger is necessary to prevent the probable failure of windom; and

RESOLVED FURTHER, That the Bank Board finds that the Merger is instituted for supervisory reasons; and

Holding Company Approval

RESOLVED FURTHER, That the Bank Board, as operating head of the FSLIC, has considered the financial and managerial resources and future prospects of the Applicant, Savings Bank, and Windom and the convenience and needs of the communities served by Windom and to be served by Savings Bank; and

RESOLVED FURTHER, That the Bank Board, as operating head of the FSLIC, finds that the acquisition of control of Savings Bank proposed in the Application would not be detrimental to Savings Bank or Windom or to the insurance risk of the FSLIC; and

RESOLVED FURTHER, That the Bank Board, as operating head of the FSLIC, determines that the proposed acquisition of control of Windom by the Applicant by reason of the Supervisory Merger meets the approval standards of § 408(e)(1)(B) and (e)(2) of the Act, 12 U.S.C. § 1730a(e)(1)(B) and (e)(2) (1982); and

RESOLVED FURTHER, That, the Bank Board, as operating head of the FSLIC, hereby approves and authorizes, pursuant to §§ 408(e)(1)(B) of the Act, 12 U.S.C. §§ 1730a(e)(1)(B) (1982), the acquisition by Applicant of control of Windom, *provided* that:

(1) Upon the chartering of Savings Bank, Winstar causes Savings Bank to execute the Merger Agreement executed by Windom;
(2) Upon consummation of the Acquisition, the Applicant shall file with the FSLIC and the

Supervisory Agent a Net Worth Maintenance Stipulation, pursuant to which (A) the Applicant, stipulates to the FSLIC that, so long as it controls Savings Bank, as the term "control" is defined by § 408 of the Act, and § 583.26 of the Regulations for Savings and Loan Holding Companies ("Holding Company Regulations"), it shall cause the net worth of Savings Bank to be maintained at a level consistent with that required by § 563.13 of the Insurance Regulations, as now or hereafter in effect, for institutions insured 20 years or longer, without regard to any net worth certificate assistance for which Savings Bank may qualify under § 406(f)(5) of the Act, 12 U.S.C. § 1729(f)(5) (1982), and it shall, as necessary, cause sufficient cash to be contributed to Savings Bank to effect compliance with such requirement, and (B) the Applicant and Savings Bank waive any claim to assistance under § 406(f)(5) of the Act;

(3) Upon consummation of the Acquisition, Winstar shall file with the FSLIC and the Supervisory Agent a Stock Transfer Stipulation, pursuant to which Winstar stipulates to the FSLIC that for the longer of the term of the Assistance Agreement or three full years following the Merger it will maintain control of Savings Bank, as control is defined in § 408(e) of the Act and § 583.26 of the Holding Company Regulations and will not sell, transfer, pledge or otherwise dispose of, stock of Savings Bank except for the security interest granted to Northwest Bank, Minneapolis, Minnesota, for its $1,750,000.00 loan to Winstar for its initial purchase of Savings Bank's stock;

(4) Upon consummation of the Acquisition, the Applicant shall file a Dividend Limitation Stipulation with the Supervisory Agent pursuant to which the Applicant stipulates that, so long as the Applicant directly or indirectly controls Savings Bank, as control is defined by § 583.26 of the Holding Company Regulations, Savings Bank shall not declare or pay a dividend in any fiscal year that exceeds 50% of Savings Bank's net income, as defined in § 563c.12 of the Insurance Regulations, for the fiscal year, as reflected on Savings Bank's quarterly or other financial reports to the Bank Board, without the prior written approval of the Supervisory Agent and the concurrence of the Director of the Office of Examinations and Supervision, provided that any dividends permitted under this limitation may be deferred and paid in a subsequent year, but in no event may dividends be paid that would reduce Savings Bank's net worth below the level required under § 563.13(b) of the Insurance Regulations for institutions insured 20 years or longer;

(5) Upon consummation of the Acquisition, the Applicant and its shareholders shall file a Stipulation of Affiliate Status in the form submitted to the Bank Board or in substantially similar form, with the Supervisory Agent, pursuant to which the Applicant and its shareholders stipulate that they jointly and severally control Savings Bank and further stipulate that, to the extent that certain entities are not otherwise included within the definition of affiliated person in § 561.29 of the Insurance Regulations, or within the definition of affiliate

in § 583.15 of the Holding Company Regulations, such entities shall be deemed to be affiliates for purposes of compliance with the regulations of the Bank Board and the FSLIC regulating conflicts of interest and transactions with affiliates;

(6) Upon consummation of the Acquisition, the Applicant shall file with the Supervisory Agent, as an addendum to its business plan, a Stipulation Restricting Securities Brokerage Activities in the form submitted to the Bank Board or in substantially similar form, pursuant to which the Applicant stipulates to restrictions on the conduct of any securities brokerage business by the Applicant and its subsidiaries; and

(7) Not later than 30 days from the Closing Date, counsel to Savings Bank shall submit a certification to the Supervisory Agent stating the effective date of the Acquisition and that the Acquisition has been consummated in accordance with the provisions of all applicable laws and regulations, the Application, and this Resolution; and

RESOLVED FURTHER, That the Bank Board finds that approval of the Acquisition by Applicant of control of Windom is necessary to prevent the probable failure of Windom; and

RESOLVED FURTHER, That the Bank Board finds that the Acquisition by Applicant of control of Windom is instituted for supervisory reasons; and

RESOLVED FURTHER, That the Director be and hereby is authorized and directed to take such steps

or actions as may be desirable or necessary to the completion of the Acquisition on the terms approved by this Resolution; and

RESOLVED FURTHER, That any of the stipulations required to be submitted by the Applicant and Savings Bank in connection with the Acquisition of control of Windom, and any other documents necessary to effect such Acquisition shall be in the form or substantially in the form of the proposed documents presented to the Bank Board, *provided* that the Director, with the concurrence of the Office of Examinations and Supervision, may agree to such changes as do not involve matters of policy, and *provided further* that the final forms of such documents have been approved by the Office of General Counsel; and

Assistance Agreement

RESOLVED FURTHER, That the Bank Board, as operating head of the FSLIC, hereby determines, pursuant to § 406(f)(1-4) of the Act, 12 U.S.C. § 1729(f)(1-4) (1982), that (1) financial assistance by the FSLIC is necessary to prevent the default of Windom and to facilitate the Merger with Savings Bank, and (2) the amount of such assistance, to be provided in accordance with the terms and conditions of the proposed Assistance Agreement, would not exceed the cost reasonably necessary to save the cost of liquidating Windom through a receivership accompanied by the payment of insurance of accounts; and

RESOLVED FURTHER, That the proposed Assistance Agreement is hereby approved, and the Director, or such persons as the Director may designate,

be and hereby are authorized to execute on behalf of the FSLIC an agreement in the form or substantially in the form of the proposed Assistance Agreement, *provided* that the final form of such Agreement has been approved by the Office of the General Counsel; and

RESOLVED FURTHER, That the Director is authorized to take such further actions as may be necessary or appropriate to exercise the rights and fulfill the obligations of the FSLIC contained in the Assistance Agreement; and

Tax Certification

RESOLVED FURTHER, That the Bank Board hereby finds and certifies that the ground set forth in 12 U.S.C. § 1464(d)(6)(A)(i) (1982) exists with respect to Windom in that Windom is insolvent in that the assets of Windom are less than its obligations to its creditors and others, including its members; and

RESOLVED FURTHER, That the Secretary or any Assistant Secretary is hereby authorized and directed to send to Savings Bank a letter certifying on behalf of the Bank Board the determination made in the immediately preceding resolving paragraph, and to provide copies of such letter to any agency of the United States upon request; and

Bank Stock and Membership

RESOLVED FURTHER, That the transfer of the stock of Windom in the Des Moines Bank to Savings Bank is approved as of the effective date of the Merger; and

RESOLVED FURTHER, That the cessation of the membership of Windom in the Des Moines Bank be noted by reason of the Merger hereinbefore approved, effective as of the effective date of the Merger; and

Certificate of Insurance

RESOLVED FURTHER, That the Secretary or an Assistant Secretary hereby is directed to cancel the certificate of insurance of Windom upon its surrender to the FSLIC; and

Branch Offices

RESOLVED FURTHER, The maintenance of the home and branch offices of Windom as home and branch offices of Savings Bank subsequent to the Merger is hereby approved; and

Forebearance

RESOLVED FURTHER, That the Bank Board has considered certain regulatory forbearance requested by the Applicant and contained in a proposed letter (a copy of which is in the Minute Exhibit File); and

RESOLVED FURTHER, That the Secretary or any Assistant Secretary is authorized and hereby directed to send Savings Bank a letter in the form considered by the Bank Board; and

Effective Date of Merger

RESOLVED FURTHER, That the effective date of the Merger of Windom with Savings Bank shall be 11:59 p.m., local time, on July 10, 1984, or such other date and time as the Supervisory Agent shall

determine, provided that such date shall be no later than July 31, 1984.

By the Federal Home Loan Bank Board

J.J. Finn
Secretary

FEDERAL HOME LOAN BANK BOARD

Delegation of Authority
No. 84-364
Date: July 6, 1984

WHEREAS, The Director, Deputy Director, or an Associate Director, Office of the Federal Savings and Loan Insurance Corporation ("FSLIC"), or such persons as any of them may designate have been authorized by Resolution No. 84-363, dated July 6, 1984, to execute on behalf of the FSLIC in its corporate capacity an Assistance Agreement with Winstar Corporation, Roseville, Minnesota and United Federal Savings Bank, Windom, Minnesota; and

WHEREAS, The Assistance Agreement imposes certain rights, duties, and obligations upon the FSLIC in its corporate capacity that do not require basic determinations of policy; and

WHEREAS, In the administration of such agreements, and of any rights or obligations of the FSLIC under them, it may be necessary or desirable that the FSLIC in its corporate capacity contract for legal, auditing, or other services:

NOW THEREFORE, IT IS RESOLVED, That the Federal Home Loan Bank Board ("Bank Board"), as operating head of the FSLIC, determines that such expenditures of the FSLIC in its corporate capacity pursuant to the Assistance Agreement are necessary, made under the National Housing Act, and shall be incurred, allowed, and paid under the provisions of the fourth sentence of § 402(c)(5) of the National

Housing Act, as amended, 12 U.S.C. § 1725(c)(5) (1982), without regard to the provisions of any other law governing the expenditure of public funds; and

RESOLVED FURTHER, That effective upon the execution of the Assistance Agreement, the Director or Deputy Director, Office of the FSLIC, or such person as either of them may designate is hereby authorized and directed to take such actions as may be desirable or necessary to fulfill the rights, duties, and obligations of the FSLIC in its corporate capacity under such Agreement and to incur, allow, and pay all expenditures in fulfillment of such rights, duties, and obligations, pursuant to the fourth sentence of § 402(c)(5) of the National Housing Act, as amended, 12 U.S.C. § 1725(c)(5) (1982), including, but not limited to:

(1) The payment of amounts required by such Agreement;
(2) Contracting for legal, accounting or other services;
(3) The assignment and pursuit of claims; and

RESOLVED FURTHER, That the General Counsel may also exercise the authority conferred pursuant to the preceding paragraph with respect to contracting on behalf of the FSLIC for legal or other related services needed to implement such agreements.

RESOLVED FURTHER, That the Director or Deputy Director, Office of the FSLIC, or a person designated by either is authorized and directed to take all other actions necessary and appropriate to exercise the rights, and fulfill the duties and obligations of the FSLIC in the administration of the agreements.

By the Federal Home Loan Bank Board

J. J. Finn
Secretary

ASSISTANCE AGREEMENT
BETWEEN
THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION
AND
WINSTAR CORPORATION, ROSEVILLE, MINNESOTA
AND
UNITED FEDERAL SAVINGS BANK WINDOM, MINNESOTA
Dated July 12, 1984

SUMMARY OF SUBSTANTIVE PROVISIONS

Assistance Provided	Section in Agreement
Cash contribution of $1,950,000 plus an amount equal to aggregate negative net worth of the Merging Association $ _____ as of the Effective Date.	§ 4
Indemnification for undisclosed liabilities, unreserved for claims against the Merging Association, and litigation challenging the merger.	§ 5

ASSISTANCE AGREEMENT
BETWEEN
THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, and WINSTAR CORPORATION, ROSEVILLE, MINNESOTA and UNITED FEDERAL SAVINGS BANK, WINDOM, MINNESOTA
dated July 12, 1984

TABLE OF CONTENTS

Recitals ..... [91]
Agreement ..... [93]
§ 1 Definitions ..... [93]
(a) "Bank Board" ..... [93]
(b) "Claim" ..... [93]
(c) "Control" and "Controls" ..... [93]
(d) "Effective Date" ..... [93]
(e) "Financial Report" ..... [93]
(f) "Insurance Regulations" ..... [93]
(g) "Liquidation" ..... [93]
(h) "Management Standards" ..... [93]
(i) "Merger" ..... [93]
(j) "Merging Association Claim" ..... [93]
(k) "Net Proceeds Received" ..... [94]
(l) "Net Worth" ..... [94]
(m) "Quarter" ..... [94]
§ 2 Conditions ..... [95]
§ 3 Audit ..... [96]
§ 4 Contributions ..... [97]
(a) Cash Contribution ..... [97]
(b) Indemnification Contributions ..... [99]
(c) Assignment Contributions ..... [99]
(d) Adjustments ..... [100]

§ 5 Indemnification for Undisclosed Liabilities, Claims Against the MERGING ASSOCIATION, and Litigation Challenging the Merger ..... [100]
(a) Indemnifications ..... [100]
(1) Undisclosed Liabilities ..... [100]
(2) Unreserved for Claims ..... [101]
(3) Challenges to the Merger ..... [101]
(b) Pursuit of Matters ..... [102]
(c) Payments as Contributions ..... [102]
(d) Limitations ..... [102]
§ 6 Merging Association Claims ..... [103]
§ 7 Tax Benefits ..... [105]
§ 8 Reports and Records ..... [105]
(a) Quarterly Reports ..... [105]
(b) Final Accounting ..... [106]
(c) Access to Books and Records ..... [106]
(d) Examinations ..... [106]
§ 9 Covenants of RESULTING ASSOCIATION ..... [106]
(a) Management Standard ..... [107]
(b) Conduct of Litigation ..... [107]
§ 10 Accounting Principles ..... [108]
§ 11 Representations and Warranties ..... [109]
§ 12 Notices ..... [110]
§ 13 Termination of Agreement ..... [110]
§ 14 Rights and Forbearance ..... [111]
§ 15 Governing Law ..... [111]
§ 16 Entire Agreement, Severability ..... [112]
§ 17 Counterparts, Modification, Headings ..... [112]
§ 18 Successors and Assigns ..... [113]
§ 19 Sole Benefit ..... [113]
§ 20 Continuing Cooperation ..... [113]
Signature Page ..... [114]

ASSISTANCE AGREEMENT

THIS ASSISTANCE AGREEMENT ("Agreement"), dated July 12, 1984, is entered into by and between the WINSTAR CORPORATION, Roseville, Minnesota, a Minnesota corporation ("WINSTAR"), UNITED FEDERAL SAVINGS BANK, Windom, Minnesota, a de novo federal stock savings bank, which will be a wholly-owned subsidiary of WINSTAR ("RESULTING ASSOCIATION"), and the FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a corporate instrumentality and agency of the United States ("CORPORATION").

RECITALS

A. The CORPORATION insures the accounts of WINDOM FEDERAL SAVINGS AND LOAN ASSOCIATION, Windom, Minnesota ("MERGING ASSOCIATION"), and will insure the accounts of the RESULTING ASSOCIATION, in accordance with § 403 of the National Housing Act, as amended, 12 U.S.C. § 1725 (1982).

B. The Federal Home Loan Bank Board ("Bank Board"), in Resolution No. 84-363, dated July 6, 1984, approved (1) the chartering of the RESULTING ASSOCIATION as a de novo federal stock savings bank, the accounts of which will be insured by the CORPORATION, (2) a proposal by WINSTAR to acquire the MERGING ASSOCIATION by means of the merger of the MERGING ASSOCIATION into the RESULTING ASSOCIATION ("Merger"), (3) WINSTAR's acquisition of the RESULTING ASSOCIATION's capital stock, which WINSTAR will purchase for two million dollars, and (4) the MERGING ASSOCIATION's supervisory conversion to

stock form and merger with the RESULTING ASSOCIATION.

C. The MERGING ASSOCIATION has entered into a Combination Agreement and Plan of Merger ("Merger Agreement") with WINSTAR, pursuant to which WINSTAR has agreed to cause the RESULTING ASSOCIATION to consummate the Merger pursuant to such agreement, which also provides that the RESULTING ASSOCIATION will succeed to all rights, obligations, duties, and liabilities of the MERGING ASSOCIATION, and all assets and property of every kind and character belonging to the MERGING ASSOCIATION will be vested in and become the property of the RESULTING ASSOCIATION.

D. A condition precedent to the obligation of the parties to consummate such merger is that the CORPORATION, the RESULTING ASSOCIATION, and WINSTAR enter into an agreement in the form of this Agreement, which will provide financial assistance and indemnification to the RESULTING ASSOCIATION, in order to facilitate the Merger as approved by the Bank Board.

E. The CORPORATION has decided, pursuant to § 406(f) of the National Housing Act, as amended, 12 U.S.C. § 1729(f) (1982), to provide financial assistance and indemnification as set forth in this Agreement, having determined that the MERGING ASSOCIATION is in danger of default and that the amount of such assistance and indemnification would be less than the losses the CORPORATION would sustain upon the liquidation of the MERGING ASSOCIATION through a receivership accompanied by the payment of insurance of accounts.

F. In consideration of the mutual promises contained in this Agreement, the parties enter into the following agreement.

AGREEMENT

§1 *Definitions.* For the purpose of this Agreement the following terms have the indicated meanings:

(a) *"Bank Board"*: The Federal Home Loan Bank Board.

(b) *"Claim"*: Any claim, demand, cause of action, or judgment.

(c) *"Control"* and *"Controls"*: These terms have the meaning indicated in § 583.26 of the Regulations for Savings and Loan Holding Companies.

(d) *"Effective Date"*: The date and time at which the Merger of the MERGING ASSOCIATION into the RESULTING ASSOCIATION becomes effective pursuant to the terms of the Merger Agreement and applicable law.

(e) *"Financial Report"*: The Quarterly Report required of insured institutions by the Bank Board or any other periodic report required of insured institutions.

(f) *"Insurance Regulations"*: The Rules and Regulations for the CORPORATION.

(g) *Liquidation"*: The release, compromise, satisfaction, settlement, reduction to judgment, or assignment to other than the CORPORATION of any Claim.

(h) *"Management Standard"*: The standard of prudent business practice generally employed by financial institutions in Minnesota in administering their assets and liabilities.

(i) *"Merger"*: The supervisory merger of the MERGING ASSOCIATION into the RESULTING ASSOCIATION under the Merger Agreement.

(j) *"Merging Association Claim"*: Any unrealized Claim of the MERGING ASSOCIATION or the RESULTING ASSOCIATION, as its successor,

against (1) a person serving on or prior to the Effective Date as a director, officer, employee, or agent of the MERGING ASSOCIATION or any of its subsidiaries, provided that an action or inaction of such person on or prior to the Effective Date gave rise to such Claim; (2) an insurer who may be liable for the indemnification of the loss caused by the action or inaction of such person; (3) any administrator, executor, personal representative, heir, or assign of any such person; or (4) any other person or persons, partnership, corporation, or legal entity ("third party"), and any administrator, executor, personal representative, heir, or assign of such third party, provided that the Claim against such third party is related to a Claim against a party referred to under (1), (2), or (3) above.

(k) *"Net Proceeds Received"*: As used in reference to the amount received upon the Liquidation of a Claim, the amount computed by deducting from the gross proceeds received all reasonable expenses in the form of payments to third parties, incurred or paid by the RESULTING ASSOCIATION in connection with such Liquidation, provided such expenses have not been reimbursed otherwise. Such "reasonable expenses" may include, without being limited to, attorneys' and accountants' fees, travel expenses, court costs and related litigation expenses, and such other actual costs that are directly related to the Liquidation of the Claim.

(l) *"Net Worth"*: Regulatory Net Worth as defined in § 561.13 of the Insurance Regulations and as computed in accordance with the accounting principles required by this Agreement.

(m) *"Quarter"*: A calendar quarter, provided that the first Quarter during the term of this Agreement shall be deemed to include the period, if any, from the

Effective Date to the last day preceding the first day of the first full calendar quarter following the Effective Date.

§ 2 *Conditions.*

(a) The obligations of the parties are subject to the Merger becoming effective no later than 30 days after the date of this Agreement, unless such date is extended in writing by the Principal or other Supervisory Agent of the Bank Board, Des Moines, Iowa ("Supervisory Agent").

(b) The CORPORATION's obligations under this Agreement are also conditioned upon receipt of the following:

(1) An opinion from independent counsel for the RESULTING ASSOCIATION, in form and substance satisfactory to the CORPORATION and its counsel, to the effect that:

(A) The Merger has been duly authorized by the directors of the MERGING ASSOCIATION, WINSTAR, and the RESULTING ASSOCIATION and effected in compliance with the Charter and Bylaws of the MERGING ASSOCIATION, WINSTAR, and the RESULTING ASSOCIATION and with applicable law;

(B) This Agreement has been duly authorized, executed, and delivered, and constitutes a valid and binding obligation of WINSTAR and the RESULTING ASSOCIATION, enforceable in accordance with its terms;

(2) A certified copy of the corporate resolutions of WINSTAR and the RESULTING ASSOCIATION authorizing execution and delivery of the Merger Agreement and this Agreement;

(3) A certified copy of the corporate resolution of the MERGING ASSOCIATION authorizing execution and delivery of the Merger Agreement;

(4) Certification by the RESULTING ASSOCIATION's Secretary, after completion of the sale of its capital stock, stating that the capital stock has been sold, the price at which it was sold, the date of the sale, and the net proceeds received;

(5) A copy of the RESULTING ASSOCIATION's stock certificate, which shall include a statement to the effect that the shares are restricted as to transfer for a period of three years from the date of issuance, except with the prior written consent of the CORPORATION;

(6) An opinion of the RESULTING ASSOCIATION's independent counsel that all applicable securities law requirements have been met in connection with the sale of the RESULTING ASSOCIATION's stock.

(c) The CORPORATION's obligations under this Agreement are further conditioned upon WINSTAR's:

(1) Maintaining, for so long as WINSTAR directly or indirectly controls the RESULTING ASSOCIATION, but in no event for less than three years, the RESULTING ASSOCIATION's Net Worth at an amount not less than the minimum amount prescribed in § 563.13 of the Insurance Regulations for institutions insured twenty years or longer;

(2) Causing the RESULTING ASSOCIATION to perform its obligations under this Agreement; and

(3) Guaranteeing the satisfaction of any obligation the RESULTING ASSOCIATION assumes under this Agreement.

§ 3 *Audit.* As soon as is practicable after the Effective Date, the CORPORATION, at its own expense but with the assistance of the RESULTING

ASSOCIATION's personnel, whose salaries and expenses shall be paid by the RESULTING ASSOCIATION without reimbursement from the CORPORATION, shall prepare an audit of the MERGING ASSOCIATION as of the Effective Date in accordance with generally accepted auditing standards, as modified by the CORPORATION. The scope of the audit shall be limited to that which the CORPORATION determines to be necessary to implement this Agreement and shall not include a revaluation of the MERGING ASSOCIATION's assets, except that valuation reserves established by the MERGING ASSOCIATION since June 30, 1983, other than those established at the request of the Supervisory Agent, shall be revalued if the CORPORATION requests such revaluation. Upon its completion and approval by the CORPORATION, a copy of the audit, which shall be prepared in such form as the CORPORATION shall determine, shall be furnished to the RESULTING ASSOCIATION.

§ 4 *Contributions.*

(a) *Cash Contribution.* The CORPORATION shall make a cash contribution to the RESULTING ASSOCIATION equal to $1,950,000 plus a sum equal to the MERGING ASSOCIATION's aggregate negative Net Worth as of the Effective Date ("Net Worth Contribution") as follows:

(1) As soon as possible following the Effective Date, but in any event within ten business days after the Effective Date, the CORPORATION shall transmit to the RESULTING ASSOCIATION a cash contribution equal to (A) $1,950,000, plus (B) a sum equal to the CORPORATION's estimate of the Net Worth Contribution, which estimate will be the sum of negative net worth shown on the most recent Financial Report for the MERGING ASSOCIATION

filed with the Bank Board prior to the Effective Date, plus the estimated loss for the period following that of the last filed Financial Report, calculated by multiplying the average per diem loss, determined from the last Financial Report filed before the Effective Date, by the number of days between the last day covered by such Financial Report and the Effective Date ("Estimated Net Worth Contribution").

(2) The amount of the Estimated Net Worth Contribution shall be adjusted following the Audit required by § 3 of this Agreement and, to the extent that the MERGING ASSOCIATION's audited Net Worth is greater than the Estimated Net Worth Contribution, the CORPORATION shall pay a cash sum equal to the amount of such difference to the RESULTING ASSOCIATION and, to the extent the audited Net Worth is lesser than the Estimated Net Worth Contribution, the RESULTING ASSOCIATION shall pay a cash sum equal to such difference to the CORPORATION. Any adjustment payment due from the CORPORATION to the RESULTING ASSOCIATION, as a result of the audit, shall be remitted by the CORPORATION within ten business days of acceptance by the CORPORATION of the final audit report. Further, the CORPORATION will utilize its best efforts to obtain, review and accept the final audit report within 120 days of the Effective Date. Any adjustment payment due to the CORPORATION from the RESULTING ASSOCIATION, as a result of the audit, shall be remitted by the RESULTING ASSOCIATION within ten business days after notification by the CORPORATION that such a payment is due.

For purposes of periodic financial reports to the Bank Board, all cash contributions, other than Net

Worth Contributions, made under this § 4(a) shall be directly credited to the RESULTING ASSOCIATION's net worth; provided, however, that such accounting treatment of the contributions made under this § 4(a) is not hereby authorized for any filings or other reports the RESULTING ASSOCIATION may make to the Bank Board or others, including, but not limited to, financial statements required to be prepared in accordance with generally accepted accounting principles as in effect at the time of their submission. In the event that a court of competent jurisdiction directs the RESULTING ASSOCIATION to divest itself of the assets and liabilities of the MERGING ASSOCIATION, the cash contributions made pursuant to this § 4(a) shall be repaid to the CORPORATION by the RESULTING ASSOCIATION.

(b) *Indemnification Contributions.* Within 30 days after receipt of each of the RESULTING ASSOCIATION's quarterly reports required pursuant to § 8(a) of this Agreement, and within 90 days after receipt of the final accounting required pursuant to § 8(b) of this Agreement, the CORPORATION shall contribute to the RESULTING ASSOCIATION any amounts set forth on such report that are owed to the RESULTING ASSOCIATION pursuant to §§ 5 and 6.

(c) *Assignment Contributions.* In the event that the CORPORATION exercises its right to the assignment of a Merging Association Claim pursuant to § 6(c), the amount of any payment made by the CORPORATION in excess of the fair market value of such Claim shall be deemed to be a contribution by the CORPORATION. Fair market value may be determined by agreement of the CORPORATION and the RESULTING ASSOCIATION or by an

appraisal by an independent appraiser approved by the CORPORATION, the cost of which appraisal shall be paid by the CORPORATION.

(d) *Adjustments.* Any contribution or payment by the CORPORATION or any accounting or report furnished by the RESULTING ASSOCIATION under this Agreement shall be subject to adjustment if it subsequently is determined that such contribution, payment, accounting, or report was based upon error or was not computed in accordance with the accounting principles prescribed by this Agreement.

§ 5 *Indemnification for Undisclosed Liabilities, Claims Against the MERGING ASSOCIATION, and Litigation Challenging the Merger.*

(a) *Indemnifications.* To the extent not otherwise reimbursed or reimbursable by the CORPORATION or under any insurance policy, bond or other provision for funding, provided that the RESULTING ASSOCIATION complies with the covenants set forth in § 9, the CORPORATION will indemnify the RESULTING ASSOCIATION for, and pay as provided in § 4(b), the amounts paid by the RESULTING ASSOCIATION to satisfy, settle, or compromise the following liabilities, Claims, and litigation and the reasonable costs and expenses of related litigation, including attorneys' and accountants' fees, travel expenses, court costs and related litigation expenses, and such other actual costs, including consideration by the CORPORATION of the payment of actual out of pocket expenses of employees of the RESULTING ASSOCIATION, as may be incurred in connection with such satisfaction, settlement or compromise:

(1) *Undisclosed Liabilities.* Any liability of the MERGING ASSOCIATION or any subsidiary corporation that (A) was not disclosed in or reflected on the MERGING ASSOCIATION's or a subsidiary

corporation's books and records prior to the Effective Date and (B) under generally accepted accounting principles as of the Effective Date and consistently applied, is of the type that should have been so disclosed or reflected; provided that for the purposes of this § 5(a)(1), the term "liability" shall not be construed to include any inadequacy in or the lack of a valuation allowance or specific reserve;

(2) *Unreserved for Claims.* Any Claim against the MERGING ASSOCIATION or any subsidiary corporation, or the RESULTING ASSOCIATION as the successor to the MERGING ASSOCIATION, based upon an action or failure to act of the MERGING ASSOCIATION or any subsidiary corporation prior to the Effective Date, whether filed before or after such date, to the extent that such Claim (A) was not adequately reserved for or provision made for its payment on the MERGING ASSOCIATION's or a subsidiary corporation's books and records prior to the Effective Date, and (B) is not fully reimbursed or reimbursable under any insurance policy, bond, or other provision for funding; and

(3) *Challenges to the Merger.* Except for an action by the RESULTING ASSOCIATION, any litigation brought within a period of one year following the Effective Date to challenge or set aside the Merger or this Agreement in which an essential element is a claim that an action or failure to act by the Bank Board or the CORPORATION was not in accordance with the Bank Board's or the CORPORATION's enabling legislation and, in the event that a court of competent jurisdiction directs the RESULTING ASSOCIATION to divest itself of the assets or liabilities of the MERGING ASSOCIATION, the reasonable costs and expenses of such divestiture, provided that such damages are directly attributable

to such action or failure to act by the Bank Board or the CORPORATION.

(b) *Pursuit of Matters.* The RESULTING ASSOCIATION shall use its best efforts to reduce or minimize the CORPORATION's indemnity payments under this § 5 by the pursuit of counterclaims, offsets, insurance settlements, and Claims related to the liabilities indemnified for and shall promptly notify the CORPORATION of any evidence it discovers indicating a basis for such pursuit. The CORPORATION shall indemnify the RESULTING ASSOCIATION for all reasonable costs and expenses related to such pursuit, including, but not limited to, attorneys' and accountants' fees, travel expenses, court costs and related litigation expenses, and such other actual costs as may be incurred by the RESULTING ASSOCIATION in complying with this § 5(b), provided that the RESULTING ASSOCIATION complies with the covenants set forth in § 9. The CORPORATION will consider payment of actual out of pocket expenses of employees of the RESULTING ASSOCIATION when incurred in the pursuit of counterclaims, offsets, insurance settlements and claims. All sums recovered from such related counterclaims, offsets, insurance settlements, and related Claims shall be paid over to the CORPORATION to the extent that the CORPORATION has made contributions pursuant to this Agreement.

(c) *Payments as Contributions.* All payments made by the CORPORATION to the RESULTING ASSOCIATION under this § 5 shall be considered contributions under this Agreement.

(d) *Limitations.* The CORPORATION's aggregate contributions with respect to the liabilities of a subsidiary corporation under § 5(a)(1) of this Agreement and Claims against subsidiary corporations

under § 5(a)(2) shall be limited to the amount of the MERGING ASSOCIATION's investment in that subsidiary corporation.

§ 6 *Merging Association Claims.*

(a) The RESULTING ASSOCIATION shall use its best efforts in pursuing and filing actions on all practicably recoverable Merging Association Claims which accrue to the RESULTING ASSOCIATION as successor in interest to the MERGING ASSOCIATION, whether discovered before or after the Effective Date.

(b) Provided that the RESULTING ASSOCIATION complies with the covenants set forth in § 9, the CORPORATION shall indemnify the RESULTING ASSOCIATION for the reasonable costs and expenses incurred by it in connection with the prosecution of Merging Association Claims, including, but not limited to, attorneys' and accountants' fees, travel expenses, court costs and related litigation expenses, and such other actual costs as may be incurred in connection with such prosecution, but only to the extent that such costs and expenses are not otherwise reimbursed or reimbursable. The CORPORATION will consider payment of reasonable actual out of pocket expenses of employees of the RESULTING ASSOCIATION when incurred in the prosecution of Merging Association claims. Any amount paid by the CORPORATION pursuant to this subsection shall be considered to be a contribution by the CORPORATION to the RESULTING ASSOCIATION.

(c) At any time during the term of this Agreement and until 90 days after the date on which this Agreement terminates, the CORPORATION shall have the right, upon its request, to obtain from the RESULTING ASSOCIATION an assignment of

any Merging Association Claim. If a Merging Association Claim had a value reflected on the books of the MERGING ASSOCIATION immediately prior to the Effective Date, the CORPORATION shall pay for such assignment that value, as adjusted or determined in accordance with the accounting principles as required by this Agreement, within 10 business days after the assignment is completed. In order to facilitate the assignment of a Merging Association Claim, the RESULTING ASSOCIATION shall, at the CORPORATION's request:

(1) Execute and deliver such instruments of assignment or transfer and make endorsements in such form and manner, and at such time, as the CORPORATION shall require; and

(2) Execute and deliver all other instruments that the RESULTING ASSOCIATION possesses and the CORPORATION deems necessary or requisite to complete such assignments or transfers.

(d) If the RESULTING ASSOCIATION has recovered on a Merging Association Claim, the Net Proceeds Received upon the Liquidation of such Merging Association Claim in excess of the value, if any, of such claim reflected on the books of the MERGING ASSOCIATION prior to the Effective Date shall be paid over to the CORPORATION to the extent that it has made contributions pursuant to this Agreement.

(e) If the CORPORATION has recovered on a Merging Association Claim that was assigned to the CORPORATION, the Net Proceeds Received upon the Liquidation of such Claim shall be retained by the CORPORATION to the extent of the amount, if any, paid by the CORPORATION for the assignment of such Claim and to the extent of any other contributions made pursuant to this Agreement.

(f) Any recoveries on a Merging Association Claim exceeding the amount to be retained by or reimbursed to the CORPORATION pursuant to § 6(d) or § 6(e) shall be paid to or retained by the RESULTING ASSOCIATION.

(g) The RESULTING ASSOCIATION shall promptly notify the CORPORATION of any evidence that it discovers indicating a basis for a Merging Association Claim.

§ 7 *Tax Benefits.*

Any federal or state income tax deduction, credit, loss carryovers, or other tax benefit, which now or hereafter inures to the benefit of the RESULTING ASSOCIATION or WINSTAR as a result of this Merger, may be retained by the RESULTING ASSOCIATION or WINSTAR respectively. However, should the RESULTING ASSOCIATION or WINSTAR receive no tax deductions, credits, loss carryovers, or other benefits or be liable for taxes as a result of the Merger, the CORPORATION has no obligation to indemnify or provide additional contributions to either the RESULTING ASSOCIATION or WINSTAR.

§8 *Reports and Records.*

(a) *Quarterly Reports.* Within 45 days following the end of each Quarter in which the RESULTING ASSOCIATION receives notice of any Claim or liability that may cause a payment by or to the CORPORATION pursuant to §§ 5 or 6, the RESULTING ASSOCIATION shall furnish a report to the CORPORATION, in a format approved by the CORPORATION and supported by such data as may be necessary to verify the reporting, that shall include:

(1) Status reports on such Claims and liabilities;

(2) Payments made by and due from the CORPORATION; and

(3) Payments made by and due from the RESULTING ASSOCIATION.

(b) *Final Accounting.* Within 90 days following the date this Agreement terminates, or such longer time as the CORPORATION may permit, the RESULTING ASSOCIATION shall render to the CORPORATION a final accounting of the matters covered by this Agreement, which accounting may be prepared by the RESULTING ASSOCIATION's staff and shall include such information and be in such form as the CORPORATION shall request.

(c) *Access to Books and Records.* The RESULTING ASSOCIATION and WINSTAR shall make available to the CORPORATION all books, papers, records, and information of any kind relating to any or all matters subject to the provisions of this Agreement, including any material or information in the possession of the RESULTING ASSOCIATION, WINSTAR, or any of their affiliates or subsidiaries.

(d) *Examinations.* The CORPORATION may audit or examine the RESULTING ASSOCIATION and WINSTAR with respect to transactions affecting the implementation of this Agreement at any time or times chosen by the CORPORATION. Such audits shall be conducted by the CORPORATION at its own expense but with the assistance of the RESULTING ASSOCIATION's and WINSTAR's personnel, whose salaries and expenses shall be paid by the RESULTING ASSOCIATION and WINSTAR, respectively, without reimbursement from the CORPORATION.

§ 9 *Covenants of the RESULTING ASSOCIATION.* If the RESULTING ASSOCIATION fails to comply with the following covenants concerning the pursuit of a Merging Association Claim, the defense

of a liability, Claim, or litigation described in § 5(a), or the pursuit of a counterclaim, offset, insurance settlement, or related Claim as required under § 5(b), all such items being referred to collectively in this section as "matters," the CORPORATION may disallow a related filing of the RESULTING ASSOCIATION for indemnification.

(a) *Management Standard.* The RESULTING ASSOCIATION shall use its best efforts to minimize losses and maximize gains and recoveries in dealing with all matters that may be the basis for, or reduce the amount of any indemnification or contribution provided by the CORPORATION under this Agreement. The standard to be applied to determine whether the RESULTING ASSOCIATION uses its best efforts is the Management Standard defined in § 1(g) above.

(b) *Conduct of Litigation.* With respect to all matters described in the introductory paragraph to this § 9, the RESULTING ASSOCIATION shall:

(1) Use its best efforts to keep the CORPORATION fully informed of their status;

(2) Observe the right of the CORPORATION to monitor and direct their defense or prosecution, including the right to direct the RESULTING ASSOCIATION to file a petition to remove an action to the appropriate court or to appeal any determination of any court, provided that the CORPORATION shall bear the cost of removal and of monitoring and directing such defense or prosecution;

(3) Authorize the CORPORATION, upon the CORPORATION's election and at the CORPORATION's expense and with its own attorneys, to defend against, or to prosecute in the name of the MERGING ASSOCIATION, the RESULTING ASSOCIATION, or the CORPORATION, as the case may be,

any such matter and cooperate fully with the CORPORATION in such defense or prosecution, including, but not limited to, the furnishing to the CORPORATION of all applicable books, records, and other information in the possession or within the control of the RESULTING ASSOCIATION, WINSTAR, or any of their affiliates or subsidiaries;

(4) At the request of the CORPORATION, assign to the CORPORATION and subrogate the CORPORATION to any right, title, or interest of the RESULTING ASSOCIATION in any such matter, any defense related to such matter, and the proceeds recovered from such matter, and, in the event of such assignment, cooperate fully with the CORPORATION in the defense or prosecution of any such matter, including, but not limited to, the furnishing to the CORPORATION of all books, records, and other information in the possession or within the control of the RESULTING ASSOCIATION, WINSTAR, or any of their affiliates or subsidiaries; and

(5) Obtain the CORPORATION's written consent before (A) prosecuting any such matter by court action, (B) entering into any binding commitment with respect to the satisfaction, settlement, or compromise of any such matter, or (C) making any payment in connection therewith, unless such commitment or payment is for an amount not in excess of twenty-five thousand dollars ($25,000) or is made pursuant to an adjudication by a court of competent jurisdiction which, with the permission of the CORPORATION, the RESULTING ASSOCIATION has not appealed.

§ 10 *Accounting Principles.* Except as otherwise provided, any computations made for the purposes of this Agreement shall be governed by generally accepted accounting principles as applied on a going

concern basis in the savings and loan industry, except that where such principles conflict with the terms of this Agreement, applicable regulations of the Bank Board or the CORPORATION, or any resolution or action of the Bank Board approving or adopted concurrently with this Agreement, then this Agreement, such regulations, or such resolution or action shall govern. In the case of any ambiguity in the interpretation or construction of any provision of this Agreement, such ambiguity shall be resolved in a manner consistent with such regulations and the Bank Board's resolution or action. If there is a conflict between such regulations and the Bank Board's resolution or action, the Bank Board's resolution or action shall govern. For the purposes of this section, the governing regulations and the accounting principles shall be those in effect on the Effective Date or as subsequently clarified, interpreted, or amended by the Bank Board or the Financial Accounting Standards Board ("FASB"), respectively, or any successor organization to either. If there is a conflict between what is required by the FASB and what is required by the Bank Board, the Bank Board's interpretation and requirements shall govern.

§ 11 *Representations and Warranties.* All representations and warranties made to WINSTAR or the RESULTING ASSOCIATION in the Merger Agreement or otherwise made to WINSTAR or the RESULTING ASSOCIATION in connection with the Merger shall also be deemed to have been made to, and shall inure to the benefit of, the CORPORATION. The CORPORATION shall not, however, have the right to terminate or rescind this Agreement because of any breach of any such warranty or representation without the written consent of the

RESULTING ASSOCIATION and shall not assert against the RESULTING ASSOCIATION any Claim or right arising from the breach of such representations and warranties by the MERGING ASSOCIATION or its officers, directors, or employees.

§ 12 *Notices.*

(a) Any notice or other communication required or permitted under this Agreement, unless otherwise specifically provided for, shall be deemed given if sent by first class mail, postage prepaid, to a party at its address set forth below or at such other address as the party shall furnish in writing:

UNITED FEDERAL SAVINGS BANK
c/o Rosewood Office Plaza
Suite 300 South
1711 West County Road B
Roseville, Minnesota 55113

FEDERAL SAVINGS AND LOAN
INSURANCE CORPORATION
Attn: Director, Financial Assistance Division
1700 G Street, N.W.
Washington, D.C. 20552

(b) Unless otherwise specifically provided for, if this Agreement requires that notice be given within a certain period of time, notice shall be deemed given as of the date of posting.

§ 13 *Termination of Agreement.*

(a) Except as otherwise specifically provided in this Agreement, this Agreement shall terminate two years following the Effective Date or on such other date to which the parties or their successors agree in writing. However, if a receiver is appointed for the purpose of liquidating the RESULTING ASSOCIATION, or the RESULTING ASSOCIATION ceases

to be an association the accounts of which are insured by the CORPORATION, this Agreement and all of the CORPORATION's obligations under it shall terminate upon the effective date of such occurrence.

(b) Notwithstanding termination of this Agreement as described in § 13(a), provided that the RESULTING ASSOCIATION continues to observe after the termination date all conditions, covenants, agreements of cooperation, and agreements for the use of best efforts set forth in this Agreement, the CORPORATION shall indemnify the RESULTING ASSOCIATION for (1) any loss arising from liabilities and Claims described in § 5(a), including the reasonable costs and expenses of related litigation, (2) the reasonable costs and expenses of pursuing the matters described in § 5(b), and (3) the reasonable costs and expenses incurred by the RESULTING ASSOCIATION in the prosecution of any Merging Association Claim pursuant to § 6, provided that any such liability, Claim, matter, or Merging Association Claim is in litigation on the date that this Agreement terminates, and provided further that any recovery by the RESULTING ASSOCIATION on any matter described in § 5(b) or any Merging Association Claim shall be paid over to the CORPORATION, subject to the limitations of § 5(b) and § 6(e).

§ 14 *Rights and Forbearance.* The rights, powers, and remedies given to the parties by this Agreement shall be in addition to all rights, powers, and remedies given by any applicable statute or rule of law. Any forbearance, failure, or delay by any party in exercising or partially exercising any such right, power, or remedy shall not preclude its further exercise.

§ 15 *Governing Law.* This Agreement and the parties' rights and obligations under it shall be

governed by the law of the State of Minnesota to the extent that Federal law does not control. Nothing in this Agreement shall require any unlawful action or inaction by either party.

§ 16 *Entire Agreement, Severability.*

(a) This Agreement, together with any interpretation or understanding agreed to in writing by the parties, constitutes the entire agreement between the parties and supersedes all prior agreements and understandings of the parties in connection with it, excepting only the Merger Agreement and any resolutions or letters issued contemporaneously with this Agreement by the Bank Board or the CORPORATION, provided, however, that in the event of any conflict, variance, or inconsistency between this Agreement and the Merger Agreement the provisions of this Agreement shall govern and be binding on all parties insofar as the rights, privileges, duties, obligations, and liabilities of the CORPORATION are concerned.

(b) If any provision of this Agreement is invalid or unenforceable, all of the remaining provisions of this Agreement shall nevetheless remain in full force and effect and shall be binding upon the CORPORATION, the RESULTING ASSOCIATION, and WINSTAR.

§ 17 *Counterparts, Modification, Headings.*

(a) This Agreement may be executed in any number of counterparts, each of which shall constitute one and the same instrument, and any party may execute this Agreement by signing any such counterpart.

(b) No amendment or modification of this Agreement shall be binding unless executed in writing by the parties or their successors.

(c) Section headings are not to be considered part of this Agreement, are solely for convenience of

reference, and shall not affect the meaning or interpretation of this Agreement or any of its provisions.

§ 18 *Successors and Assigns.* All the terms and provisions of this Agreement shall be binding upon and inure to the benefit of the parties and their respective transferees, succesors, and assigns, but this Agreement may not be assigned to any party nor may any rights under it be transferred to or vested in any other party, through merger, consolidation, or otherwise, without the prior written consent of the CORPORATION.

§ 19 *Sole Benefit.* It is the intention of the parties that this Agreement, the assumption of obligations and statements of responsibilities under it, and all of its conditions and provisions are for the sole benefit of the CORPORATION and the RESULTING ASSOCIATION and for the benefit of no other person or entity. Nothing expressed or referred to in this Agreement is intended or shall be construed to give any person other than the CORPORATION or the RESULTING ASSOCIATION any legal or equitable right, remedy, or claim under, or in respect to, this Agreement or any of its provisions.

§ 20 *Continuing Cooperation.* It is the purpose of this Agreement to provide a means by which the failure of the MERGING ASSOCIATION may be prevented, the savers and other creditors of the MERGING ASSOCIATION may be protected against losses, the thrift and economical home financing needs of the community in which the MERGING ASSOCIATION's home office is located may be served, the RESULTING ASSOCIATION and WINSTAR may receive the benefits and assume the risks contracted for, and expenses to the CORPORATION may be reduced. WINSTAR, the RESULTING ASSOCIATION, and the CORPORATION therefore agree that

they shall in good faith, and using their best efforts, cooperate with one another to carry out the purposes of this Agreement as described in this section.

IN WITNESS WHEREOF, the parties have executed this Agreement by their duly authorized officers or agents.

UNITED FEDERAL SAVINGS BANK

Date: 7/12/84 By: [signature]

Attest: [signature] Its: [signature]

WINSTAR CORPORATION

Date: July 12, 1984 By: [signature]

Attest: [signature] Its: President and CEO

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

Date: 7/12/1984 By: [signature]

Attest: [signature] Its: Deputy Director

COMBINATION AGREEMENT AND PLAN OF MERGER

THIS COMBINATION AGREEMENT AND PLAN OF MERGER is the contract of Windom Federal Savings and Loan Association, Windom, Minnesota, a federal mutual savings and loan association ("WINDOM" or "MERGING ASSOCIATION") and United Federal Savings Bank, Windom, Minnesota, a federal stock savings bank ("SAVINGS BANK" or "RESULTING ASSOCIATION").

RECITALS

1. The accounts of WINDOM and SAVINGS BANK are insured by the Federal Savings and Loan Insurance Corporation.

2. This merger, the supervisory conversion of WINDOM to the stock form of ownership, and the resulting acquisition of control of WINDOM are authorized by the provisions of the Home Owners Loan Act of 1933, as amended ("HOLA"), the National Housing Act, as amended, (the Act), and the rules and regulations promulgated under and pursuant to the HOLA and the Act by the Federal Home Loan Bank Board ("BANK BOARD").

3. It is deemed to be in the best interests of the members of WINDOM that WINDOM and SAVINGS BANK effect a merger upon the terms and conditions stated in this Agreement (the transaction provided for in this agreement being referred to as the "Merger").

4. It is believed that this merger will enable the RESULTING ASSOCIATION to maintain and improve WINDOM's savings, mortgage and other services, and improve the financial condition of WINDOM.

5. The following agreement is entered into in consideration of the mutual promises contained in this Agreement.

AGREEMENT

§ 1 *Merger.* WINDOM shall merge with and into SAVINGS BANK.

§ 2 *RESULTING ASSOCIATION.* The RESULTING ASSOCIATION shall be United Federal Savings Bank, Windom, Minnesota.

§ 3 *Name of the RESULTING ASSOCIATION.* The name of the RESULTING ASSOCIATION shall be United Federal Savings Bank.

§ 4 *Home Office of the RESULTING ASSOCIATION.* The home office of the RESULTING ASSOCIATION shall be located at 930 Fourth Avenue, Windom, Minnesota.

§ 5 *Charter and Bylaws of the RESULTING ASSOCIATION.* After the merger the RESULTING ASSOCIATION shall operate under the present charter and bylaws of SAVINGS BANK which are attached as Exhibit A1 and A2 respectively and constitute part of this Merger Agreement.

§ 6 *Directors of the RESULTING ASSOCIATION.* The number of directors of the RESULTING ASSOCIATION shall be six (6). The names and residence addresses of those persons who shall serve as directors of the RESULTING ASSOCIATION are listed in the attached Exhibit B, which constitutes a part of this Merger Agreement.

§ 7 *Officers.* The officers of the RESULTING ASSOCIATION shall be the officers of SAVINGS BANK.

§ 8 *Branch Offices of the RESULTING ASSOCIATION.* After the merger the branch offices of the

RESULTING ASSOCIATION shall be the present branch offices of WINDOM. The addresses of the offices that will be branch offices of the RESULTING ASSOCIATION are listed on the attached Exhibit C, which constitutes a part of the Merger Agreement.

§ 9 *Accounts.* Upon the effective date of the merger, each accountholder of the MERGING ASSOCIATION shall receive, without payment, a withdrawable account or accounts in the RESULTING ASSOCIATION equal in withdrawal value to the account or accounts held in the MERGING ASSOCIATION on such date, featuring the same rate, maturity, and other terms. Accounts of WINDOM shall continue as accounts of the RESULTING ASSOCIATION but accountholders of WINDOM shall not, due to having accounts in WINDOM, have any equity interest in the RESULTING ASSOCIATION. Accounts of the RESULTING ASSOCIATION shall be issued on the same bases as accounts issued presently by WINDOM.

§ 10 *Transfer of Assets upon Merger.* Upon the effective date of the merger, all of the assets and property of every kind or character, real, personal, and mixed, tangible and intangible, choses in action, rights, and credits then owned by the MERGING ASSOCIATION, or that would inure to it at any time thereafter, shall immediately by operation of law and without any conveyance or transfer and without further act or deed by vested in and become the property of the RESULTING ASSOCIATION, which shall have, hold, and enjoy the same in its own right as fully and to the same extent as the same were possessed, held, and enjoyed by the MERGING ASSOCIATION prior to the merger. The RESULTING ASSOCIATION shall be deemed to be and shall be a continuation of the entity and identity of WINDOM. All of the rights and obligations of the MERGING ASSOCIATION shall

remain unimpaired, and the RESULTING ASSOCIATION shall, on the effective date of the merger, succeed to all of such rights and obligations, and duties connected with them.

§ 11 *Effective Date of Merger.* This Merger Agreement is effective only when approved by the BANK BOARD. The effective date of the merger shall be the date on which the merger is approved by the BANK BOARD unless another date is specified in such approval.

§ 12 *Conduct in Ordinary Course of Business.* The MERGING ASSOCIATION warrants and represents that from the date of this Agreement to the effective date of the merger, the MERGING ASSOCIATION shall have conducted its business in its ordinary and usual course, and shall not have, without the consent of the Principal Supervisory Agent for its district, or his designee,

(a) entered into any material transaction other than in the ordinary and usual course of business, except transactions in connection with this Agreement and the transactions expressly permitted by it;

(b) borrowed any money other than advances from a Federal Home Loan Bank;

(c) encumbered any of its property or other assets except as security for advances from a Federal Home Loan Bank;

(d) disposed of, transferred, or contracted to dispose of or transfer any property, real or otherwise, or other assets, except, in each case, in the ordinary and usual course of business;

(e) entered into any contract or agreement for the purchase, sale or lease of goods, materials, equipment, supplies, capital assets, real estate or any interest in real estate except, in each case, in the ordinary and usual course of its business;

(f) incurred any material obligation or liability or had any contingent liability arise except in the ordinary and usual course of business;

(g) except for individual merit increases in accordance with standard personnel practices adopted prior to the date of this Agreement, and normal periodic employee salary and wage increases scheduled prior to the date of this Agreement, made or agreed to make any increase in the rate of compensation or remuneration to any of its directors, officers, employees, agents, or other representatives;

(h) employed any person to serve as an officer, director, or senior manager who is not employed as of the date of this Agreement; employed any person pursuant to an agreement which is not terminable at the will of the MERGING ASSOCIATION; or entered into any of the following types of contracts with any employee, director, or officer, or amended any such contract that is presently binding on the MERGING ASSOCIATION: collective bargaining agreements, pension or profit sharing, bonus, severance pay, retirement, fringe benefit or other employee benefit plans, or other employment contracts;

(i) amended or permitted the amendment of its charter or bylaws;

(j) made any material change in accounting method; or

(k) engaged in transactions described in §§ 563.17-4 and 563.17-5 of the Rules and Regulations for the Federal Savings and Loan Insurance Corporation.

§ 13 *Further Actions.* All of the transactions contemplated by this Agreement have been or will be authorized by all necessary corporate actions by WINDOM, and SAVINGS BANK. WINDOM, and SAVINGS BANK, by their proper officers, shall

execute and deliver all instruments, certificates, and other documents as may be necessary or incidental to the performance of this Agreement.

§ 14 *Counterparts, Modifications, Headings.*

(a) This Agreement may be executed in any number of counterparts, each of which shall constitute one and the same instrument, and any party may execute this Agreement by signing any such counterpart.

(b) No amendment or modification of this Agreement shall be binding unless executed in writing by the parties or their successors.

(c) Section headings are not to be considered part of this Agreement, are solely for convenience of reference, and shall not affect the meaning or interpretation of this Agreement or any of its provisions.

§ 15 *Entire Agreement, Severability.*

(a) This Agreement, together with any interpretation or understanding agreed to in writing by the parties, constitutes the entire agreement between the parties and supersedes all prior agreements and understanding of the parties in connection with it.

(b) If any provision of this Agreement is invalid or unenforceable, then to the extent possible, all of the remaining provisions of the Agreement shall remain in full force and effect and shall be binding upon the MERGING ASSOCIATION and the RESULTING ASSOCIATION.

§ 16 *Governing Law.* This Agreement and the rights and obligations under this Agreement shall be governed by the law of the State of Minnesota to the extent that Federal law does not control. Nothing in this Agreement shall require any unlawful action or inaction by either party.

§ 17 *Sole Benefit.* Nothing expressed or referred to in this Agreement is intended or shall be construed to

give any person other than the RESULTING ASSOCIATION or the MERGING ASSOCIATION any legal or equitable right, remedy, or claim under, or in respect to, this Agreement or any of its provisions, it being the intention of the parties that this Agreement, the assumption of obligations and statements of responsibilities under it, and all of its conditions and provisions are for the sole benefit of the RESULTING ASSOCIATION and the MERGING ASSOCIATION and for the benefit of no other person.

§ 18 *Acknowledgement.* The MERGING ASSOCIATION and SAVINGS BANK, by the execution of this Agreement, acknowledge and affirm that their boards of directors, by at least a two-thirds vote of each board, have approved this Agreement and the merger, authorized the execution of this Agreement, empowered the signatories to execute this Agreement, and authorized the filing of this Agreement with the BANK BOARD.

§ 19 *Assistance Agreement.* This Merger Agreement is conditioned upon the execution of an Assistance Agreement between the FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION and the RESULTING ASSOCIATION and its parent holding company the Winstar Corporation, Roseville, Minnesota.

IN WITNESS WHEREOF, the parties have executed this Agreement by their duly authorized officers or agents.

UNITED FEDERAL SAVINGS BANK

Date: 7/12/84 By: [signature]

Attest: [signature] Its: [signature]

WINDOM FEDERAL SAVINGS AND LOAN ASSOCIATION

Date: 6-29-84 By [signature]

Attest [signature] Its President

Federal Home Loan Bank Board

July 13, 1984

Board of Directors
United Federal Savings Bank
930 Fourth Avenue
Windom, Minnesota 56101

R.P.R.

Dear Sirs:

In connection with the merger of Windom Federal Savings and Loan Association, Windom, Minnesota ("Merging Association"), into United Federal Savings Bank ("Savings Bank"), this is to confirm the understanding that:

1. For purposes of reporting to the Board, Savings Bank may show, as a direct credit to its net worth, the cash contribution made by the FSLIC pursuant to Section 4(a)(1)(A) of the Assistance Agreement to be entered into among Winstar Corporation, Savings Bank, and the Federal Savings and Loan Insurance Corporation ("FSLIC");

2. For purposes of reporting to the Board, the value of any intangible assets resulting from accounting for the merger in accordance with the purchase method may be amortized by Savings Bank over a period not to exceed 35 years by the straight-line method;

3. For purposes of reporting to the Board, any discount arising from the adjustment of Savings Bank's mortgage loan portfolio to its fair value shall be credited to income by the level yield method assuming contractually required payments will be received for 15 years, and the

remaining balance will be repaid at the end of the 15th year or by other methods of applying the level yield method as described in R memoranda or other accounting documents acceptable under generally accepted accounting principles; and

4. The limitation of 50%, on Savings Bank's net income available for payment of dividends, as set forth in the Dividend Limitation Stipulation and Bank Board Resolution No. 84-363, is waived for its fiscal years beginning on July 1, 1985, July 1, 1986, and July 1, 1987. During Savings Bank's fiscal year beginning on July 1, 1985, it may pay as dividends up to 60% of its net income. During Savings Bank's fiscal year beginning on July 1, 1986, it may pay as dividends up to 70% of its net income. During Savings Bank's fiscal year beginning on July 1, 1987, it may pay as dividends up to 60% of its net income. But in no event may Savings Bank by the payment of dividends reduce its net worth below the level required by § 563.13 of the Insurance Regulations for institutions insured for twenty years or longer.

The accounting forbearances in the preceding paragraphs 1 through 3 are not acceptable in any financial statements which are required to be prepared in accordance with generally accepted accounting principles.

The forbearances or waivers extended by this letter do not relieve Savings Bank of its continuing obligations to maintain records of its reserve and net worth condition and to report its financial condition in accordance with applicable regulatory requirements.

This letter does not and shall not be construed to constitute forbearance or waiver by the Board or the FSLIC with respect to any regulatory or other requirements other than those encompassed within the preceding paragraphs 1 through 4. Other than actions to enforce the regulatory requirements waived in accordance with paragraphs 1 through 4 and the statutory provisions authorizing imposition of the waived requirements, insofar as such requirements are waived, the Board and the FSLIC expressly reserve all of their statutory rights and powers with respect to Savings Bank, including, without limitation, those under Section 5 of the Home Owners' Loan Act of 1933, as amended, and Sections 406 and 407 of the National Housing Act, as Amended.

By the Federal Home Loan Bank Board

J.J. Finn
Secretary

THIS PAGE INTENTIONALLY LEFT BLANK

UNITED STATES CLAIMS COURT

Civil Action No. 90-8-C
Chief Judge Loren Smith

WINSTAR CORPORATION, et al.,
Plaintiffs,

v.

THE UNITED STATES,
Defendant.

AFFIDAVIT OF E. TED YOCH IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO LIABILITY

Before me, a notary public for the State of Minnesota, on this date personally appeared E. Ted Yoch, being by me first duly sworn, upon his oath deposes and says:

1. I am Chief Executive Officer and Chairman of the Board of Directors of Winstar Corporation ("Winstar"). I am also Chairman of the Board of Directors of United Federal Savings Bank ("United").

2. I submit this affidavit in support of the Plaintiffs' Motion for Summary Judgment on the issues of defendant's liability. I am familiar with the matters set forth herein from my own personal knowledge or from a review of materials in the files and possession of Winstar or United.

3. Winstar was formed as a Minnesota corporation in 1984 for the purpose of acquiring control of

Windom Federal Savings and Loan Association ("Windom"), an insolvent institution at the time. United is a federal stock savings bank chartered in 1984, all of the stock of which is owned by Winstar.

4. In 1983, the organizers of Winstar, including myself, began negotiating with the Federal Home Loan Bank Board ("FHLBB") and the Federal Savings and Loan Insurance Corporation ("FSLIC") regarding the proposed acquisition of Windom. Windom was on the brink of financial ruin in 1983. Exhibit A is a true copy of a Consent Resolution adopted by Windom's Board of Directors on March 11, 1983, which was obtained from United's files.

5. Exhibit B is a true copy of a report to Windom's Board of Director from the accounting firm of McGladrey Hendrickson & Co. dated September 16, 1983, which was obtained from United's files.

6. Throughout the entire bidding and negotiating process between Winstar and FHLBB and FSLIC, it was understood by all parties that the entity that acquired Windom would be able to record as supervisory goodwill the amount by which the market value of Windom's liabilities exceeded the market value of its assets, and to amortize that goodwill over a long period of time, such as 30 to 40 years.

7. Ultimately, FHLBB and FSLIC agreed that FSLIC would provide to United a cash contribution of $1,950,000.00, plus a sum equal to Windom's aggregate negative net worth (the amount by which Windom's liabilities exceeded its assets, measured at book value). In return, Winstar agreed to form United and to invest $2 million in cash in United through the purchase of all of United's common stock.

8. After an agreement in principle was reached, the organizers of Winstar incorporated Winstar under the laws of the State of Minnesota on March 1, 1984.

Exhibit C is a true copy of a certificate from the State of Minnesota Department of State certifying that Winstar is a legally organized corporation under the laws of Minnesota.

9. In accordance with its agreement with FSLIC and FHLBB, Winstar formed United. Exhibit D is a true copy of the Plan of Organization for United.

10. United entered into a Combination Agreement and Plan of Merger with Windom setting out the terms of the acquisition. Exhibit E is a true copy of the Combination Agreement and Plan of Merger.

11. At the time of the merger between United and Windom, FSLIC entered into an Assistance Agreement with Winstar and United. Exhibit F is a true copy of the Assistance Agreement.

12. FHLBB passed a Resolution approving the supervisory merger. Exhibit G is a true copy of FHLBB Resolution No. 84-363 approving the merger.

13. FHLBB delegated certain authority pertaining to the Assistance Agreement in Resolution No. 84-364, a true copy of which is attached as Exhibit H.

14. FHLBB issued Resolution No. 84-365, further indicating its approval of the merger. A true copy of this Resolution is attached as Exhibit I.

15. In a separate forbearance letter, FHLBB set forth its commitment regarding the regulatory accounting treatment pertaining to the merger. Exhibit J is a true copy of the forbearance letter.

16. In accordance with the agreements and documents listed above, the supervisory merger between United and Windom was consummated on July 12, 1984. Winstar infused $2 million into United, receiving all of the common stock of United. United merged with Windom, and the resulting institution was known as United.

17. Under the Assistance Agreement FSLIC contributed $1,950,000.00 in cash to United. FSLIC

ultimately contributed $3,694,499.00 as its contribution based on Windom's aggregate negative net worth under § 4 of the Assistance Agreement.

18. Exhibit K is a true copy of a letter and Notes to Consolidated Statement of Financial Condition dated September 7, 1984 that was provided to United's Board of Directors by the accounting firm of McGladrey, Hendrickson & Pullen.

19. In reliance upon FSLIC's and FHLBB's express agreements concerning the use of purchase method accounting, the assets and liabilities of Windom were adjusted to fair market value at the time of the supervisory merger, and the resulting excess of liabilities over assets was recorded on United's books as supervisory goodwill to be included in capital and amortized on a straight-line basis over a period of 35 years. The amount of supervisory goodwill ultimately recorded by United as a result of the acquisition of Windom was $10,654,419.00. United also included the FSLIC cash contribution of $1,950,000.00 as capital. In financial reports filed with FSLIC and FHLBB since the supervisory merger, United has consistently booked supervisory goodwill as an asset included in capital for regulatory purposes, in accordance with, and in reliance upon, FSLIC's and FHLBB's express agreements. United has also consistently amortized the supervisory goodwill over a period of 35 years on a straight-line basis, in accordance with the agreements. Prior to the enactment of the Financial Institution Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), neither FSLIC nor FHLBB ever objected to United's treatment of supervisory goodwill.

20. After the merger with Windom, United's *tangible* net worth (i.e., exclusive of supervisory goodwill), was approximately *negative* $6.7 million.

Clearly, therefore, the purchase method of accounting for the proposed merger was integral to Winstar and United. Had Winstar and United not been permitted to record on United's books supervisory goodwill in the amount by which Windom's liabilities exceeded the fair market value of its assets, the acquisition of Windom on the remaining financial terms agreed upon would have rendered United insolvent and subject to immediate liquidation by FSLIC and FHLBB. Winstar and United would not have entered into such a transaction. Nor would they have made a proposal or entered into a transaction for the acquisition of Windom that did not include a lengthy amortization period in which to return Windom to profitability and to gradually replace supervisory goodwill with tangible assets. Thus, Winstar's willingness to form United, United's willingness to acquire Windom on the financial terms proposed, and Winstar's willingness to invest $2 million in United, were all absolutely conditioned on FHLBB's and FSLIC's agreement to permit United to report supervisory goodwill as an asset included in capital for regulatory purposes and to amortize that supervisory goodwill over a 35-year period. Absent the specified accounting treatment, Winstar and United either would have insisted upon receiving more than $5,644,500.00 in tangible financial assistance from FSLIC or would have withdrawn the offer.

21. In order to maintain United's tangible capital at 3 percent of liabilities, the regulatory minimum prevailing at the time of the supervisory merger, FSLIC would have had to contribute to United approximately $15.8 million in cash or other tangible financial assistance.

22. In 1988, Winstar purchased additional common stock from United for an additional $800,000.00. This

investment was made solely for the purpose of boosting United's capital, as Winstar already held 100 percent of United's common stock. Winstar would not have made this investment in the absence of FHLBB's and FSLIC's agreement to the specified accounting treatment for goodwill, or if Winstar or United had foreseen that the government would renege on that agreement.

23. Winstar and United have complied in good faith with all the terms and conditions of the agreements relating to the supervisory merger and have otherwise fully performed their undertakings in connection therewith.

24. As of June 30, 1989, the end of the last reporting period before the enactment of FIRREA, United reported supervisory goodwill in the amount of approximately $9.1 million. Thus, United had written off over $1.5 million of the goodwill it had acquired in its 1984 merger with Windom. Prior to FIRREA, all of the $9.1 million of supervisory goodwill was includable in United's regulatory capital. FIRREA excludes all of this goodwill for purposes of satisfying United's tangible capital requirement. FIRREA and the capital regulation promulgated by the Office of Thrift Supervision exclude all but $2.7 million of this goodwill for purposes of satisfying United's leverage limit and risk-based capital requirement. These exclusions violate Winstar's and United's contract with FHLBB and FSLIC.

25. As of September 30, 1989, it would have cost the government less to liquidate United than it would have cost FHLBB and/or FSLIC to liquidate Windom before or at the time of Windom's merger into United.

I hereby certify that the foregoing statements are true and correct, to the best of my knowledge and belief.

Dated this 27 day of March, 1990.

/s/ E. Ted Yoch
E. Ted Yoch

Subscribed and sworn to before me this 27th day of March, 1990.

/s/ MaryLou Stephani
Notary Public

My Commission Expires: June 13, 1991.

e:/1729/united/youch.aff

UNITED STATES CLAIMS COURT

No. 90-773C

STATESMAN SAVINGS HOLDING CORP.,
405 Sixth Avenue
Des Moines, Iowa 50309,

and

THE STATESMAN GROUP, INC.,
405 Sixth Avenue
Des Moines, Iowa 50309,

and

AMERICAN LIFE AND CASUALTY
INSURANCE COMPANY
601 Locust Street
Two Ruan Center, Suite 1400
Des Moines, Iowa 50309,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT

For their Complaint against the United States, plaintiffs Statesman Savings Holding Corp. ("SSHC"), The Statesman Group, Inc. ("Statesman Group"), and American Life and Casualty Insurance Company ("American Life"), state as follows:

NATURE OF ACTION

1. This action arises out of contractual promises made to plaintiffs by the Federal Savings and Loan Insurance Corporation ("FSLIC") and the Federal Home Loan Bank Board ("FHLBB") pursuant to their statutory supervisory authority over federally insured savings and loan institutions and savings banks (hereinafter referred to as "thrifts" or "thrift institutions"). As more fully described below, these contractual promises were made for the purpose of inducing plaintiffs to acquire and operate four failed thrift institutions. Plaintiffs' acquisition of these insolvent thrift institutions obviated their liquidation by FSLIC and FHLBB. If FSLIC and FHLBB had been forced to liquidate the institutions, the present value cost would have exceeded $173 million. Plaintiffs' acquisitions of these institutions saved FSLIC and FHLBB, by their own admission, $50 million in liquidation costs. Plaintiffs have fully performed their obligations under their contract with FSLIC and FHLBB. Although FSLIC and FHLBB have received the benefits of their contractual bargain with plaintiffs, they have broken their contractual promises to plaintiffs, partially as a result of the recently enacted Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. Law, No.

101-75, 103 Stat. 183, and of certain regulations promulgated by the Office of Thrift Supervision ("OTS") pursuant to FIRREA. This repudiation and abrogation of defendants' contractual promises to plaintiffs constitute a material breach of contract that defeats the central object of this agreement, a taking of plaintiffs' property without just compensation in violation of the Fifth Amendment to the United States Constitution, and a deprivation of plaintiffs' property without due process of law in violation of the Fifth Amendment to the United States Constitution. In this action, plaintiffs seek (1) a declaration that defendants' actions effect a repudiation and material breach of their contractual obligations to plaintiffs and, that, thereby, effect a taking of plaintiffs' property without just compensation and a deprivation of plaintiffs' property without due process of law, in violation of the Fifth Amendment, and (2) an order rescinding the transaction and awarding plaintiffs compensation for all monies expended or costs incurred by them, and for the value of all benefits conferred on defendants, as a consequence of plaintiffs' purchase, operation, and management of the four thrifts.

THE PARTIES TO THE TRANSACTIONS

2. Statesman Bank for Savings, FSB ("Statesman Bank") is a conservatively managed, financially sound savings bank serving the needs of communities in Iowa and Florida. Headquartered in Des Moines, Iowa, the Bank is charted by the federal government and is a member of the Federal Home Loan Bank System. Until August 9, 1989—the date on which FSLIC was abolished under FIRREA—accounts of

the Bank's depositors were insured by FSLIC. Since August 9, 1989, such accounts have been and are now insured by defendant FDIC.

3. SSHC is a holding company organized under the laws of Iowa. SSHC has 84,000 shares of common stock outstanding, all of which is owned by plaintiff American Life. SSHC has 126,000 shares of preferred stock outstanding, all of which is owned by plaintiff Statesman Group. SSHC owns one hundred percent (100%) of the issued and outstanding common stock of Statesman Bank, is entitled to receive all dividends declared by Statesman Bank, and has the right to receive the net assets of Statesman Bank upon the liquidation, dissolution or winding up of the affairs of Statesman Bank.

4. Statesman Group is a publicly owned corporation organized under the laws of Delaware. Statesman Group owns all of the outstanding preferred stock of SSHC, and all of the outstanding common and preferred stock of American Life.

5. American Life is a corporation organized under the laws of Iowa. All of the common and preferred stock of American Life is owned by Statesman Group. American Life owns all of the outstanding common stock of SSHC.

6. Prior to enactment of FIRREA, FHLBB was an agency of the United States. Under the Home Owners' Loan Act of 1933, as amended, FHLBB was charged with, among other things, regulating and supervising federally chartered savings and loan associations and savings banks, acting as the operating head of FSLIC, enforcing compliance by such institutions with regulatory capital requirements, and structuring and approving merger and acquisition agreements for failing thrifts. FHLBB delegated certain of these functions to various Federal Home

Loan Banks throughout the country, subject to FHLBB's supervision. Under Section 401 of FIRREA, FHLBB was abolished on October 8, 1989; its functions and responsibilities, for purposes relevant to this action, have been transferred to the Director, OTS.

7. Prior to enactment of FIRREA, FSLIC was an agency of the United States established under the National Housing Act of 1934, as amended, for the purposes of, among other things, insuring the accounts of depositors in thrift institutions that are members of the Federal Home Loan Bank System, establishing and enforcing minimum levels of capital for insured institutions, enforcing compliance therewith, and structuring and approving merger and acquisition agreements for failing thrifts. It was operated under the direction of the FHLBB. Under Section 401 of FIRREA, FSLIC was abolished on August 9, 1989, and its responsibilities and functions, for purposes relevant to this action, were transferred to the Federal Deposit Insurance Corporation ("FDIC").

8. FDIC is an agency of the United States established under the Federal Deposit Insurance Act, as amended, for the purpose of, among other things, insuring the accounts of depositors in certain state and federal depository institutions. FDIC is designated under FIRREA as the successor in interest to FSLIC for purposes relevant to this action. FIRREA provides that no action or other proceeding against FSLIC shall abate by reason of FIRREA's enactment but that FDIC shall be substituted as its successor in interest.

9. OTS is a bureau of the United States Department of the Treasury, and the Director of OTS is an officer and agent of the United States. Under

FIRREA the Director is charged with regulating and supervising all federally insured savings and loan associations and savings banks and enforcing compliance by such institutions with the regulatory capital requirements to be established under section 301 of FIRREA. The Director has been designated under FIRREA as the successor in interest to FHLBB for purposes relevant to this action. FIRREA provides that no action or other proceeding against FHLBB shall abate by reason of FIRREA's enactment but that the Director shall be substituted as its successor in interest.

JURISDICTION

10. This court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. 1491.

BACKGROUND

11. During the late 1970's and early 1980's unprecedented high interest rates pushed the thrift industry's cost of retaining and obtaining new deposits substantially above the rate of return on long-term, fixed-rate mortgages in thrift portfolios, precipitating a financial crisis in the thrift industry.

12. As a result of the substantial negative spread between the thrift industry's cost of funds and its return on assets, many FSLIC-insured thrift institutions either became insolvent or were threatened with insolvency in the early 1980's, and FSLIC's insurance fund was faced with the potential loss of many billions of dollars in claims by depositors of these insolvent or troubled thrifts. For example,

during the last half of 1981 and the first half of 1982, more than 80 percent of all FSLIC-insured thrift institutions incurred operating losses.

13. Under the National Housing Act of 1934, as amended, FSLIC was at all times relevant to this action authorized to facilitate, "in its sole discretion" and "upon such terms and conditions as the Corporation may determine," the merger of a failing FSLIC-insured thrift institution into a financially sound FSLIC-insured thrift institution by providing financial assistance in the form of promissory notes ("FSLIC notes") or cash contributions to the healthy institution or by guaranteeing it against loss by reason of the merger, so long as the cost of the financial assistance provided by FSLIC did not exceed the expense that would have been incurred in liquidating the institution and paying insurance claims upon its accounts.

14. Faced with a large number of failing thrift institutions, FHLBB adopted and aggressively implemented a policy of requiring insolvent or troubled thrift institutions to merge into financially sound acquirer institutions. With respect to many such "supervisory" mergers, FSLIC exercised its authority under the National Housing Act to provide assistance in the form of cash contributions, FSLIC notes, and/or guarantees to induce financially sound acquirer institutions to merge with insolvent or troubled thrifts.

15. As the crisis in the thrift industry continued to worsen, and more and more FSLIC-insured thrift institutions became insolvent or troubled, FSLIC and FHLBB recognized that continuing to facilitate supervisory mergers with cash contributions and FSLIC notes would quickly and entirely exhaust the insurance fund. Indeed, if FSLIC had provided cash

contributions and FSLIC notes at historic levels in order to induce financially healthy acquirer institutions to enter into supervisory mergers during 1981 and 1982, the FSLIC insurance fund, according to FSLIC's own calculations, would have been exhausted by April of 1982.

16. In mid-1981, FSLIC and FHLBB were thus forced to revise their policies and practices regarding the provision of financial assistance in supervisory mergers in order to prevent, or at least forestall, exhaustion of the FSLIC insurance fund. As described below, because FSLIC and FHLBB could no longer provide the amount of cash or other tangible financial assistance necessary to induce healthy acquirer institutions to merge with insolvent or troubled FSLIC-insured thrifts, FSLIC and FHLBB began inducing and arranging supervisory mergers by providing assistance in the form of an intangible asset—"supervisory goodwill." FSLIC and FHLBB also expanded the number of potential acquirers of insolvent or troubled FSLIC-insured thrift institutions by permitting interstate mergers (in the absence of an acceptable merger proposal from a financially sound in-state acquirer institution), and inter-industry mergers (in the absence of an acceptable merger proposal from either an in-state or out-of-state thrift institution). In evaluating merger proposals, FSLIC's principal objective was to merge the insolvent or troubled thrift institution into a healthy acquirer at the lowest possible cost to FSLIC.

17. In order to induce financially sound acquirer institutions to merge with insolvent or failing FSLIC-insured thrifts with little or no cash contributions, FSLIC notes, or other tangible financial assistance from FSLIC, FSLIC and FHLBB relied primarily

upon an aggressive application of the "purchase method" of accounting for the mergers. The Generally Accepted Accounting Principles ("GAAP") applicable at the time provided that in mergers and acquisitions using the purchase method of accounting, the book value of the assets and liabilities of an acquired thrift institution should be adjusted ("marked to market") to fair market value at the time of the acquisition, and that any excess in the cost of the acquisition (which includes any liabilities assumed by the acquirer) over the fair market value of the acquired assets should be separately recorded on the acquirer institution's books as "goodwill"—an intangible, non-earning asset that may be amortized on a straight-line basis over a period of up to 40 years.

18. Because of the high interest rates prevailing at the time, the fair market value of the lower yielding fixed-rate mortgage loans held by most acquired institutions was significantly less than the mortgage loans' book value (the face amount of the loans). Accordingly, in the typical supervisory merger at that time, the aggregate fair market value of the liabilities assumed by the acquirer institution exceeded the aggregate fair market value of the acquired institution's fixed-rate loans and other assets. The amount by which the acquired institution's liabilities exceed its assets is reflected on the merged institution's books as goodwill. Goodwill recorded in connection with a supervisory merger is known as "supervisory goodwill."

19. Certain mergers accomplished under the purchase method of accounting involved the "push down" technique. In a merger accounted for under the push down method, the assets and liabilities of the acquired institution are marked to market, and the difference plus the acquiring institution's merger

costs are separately allocated to goodwill on the books of the resulting institution. According to GAAP, goodwill generated from a merger accounted for under this method may be amortized to expense by the interest method over a period no longer than that over which the discount on the interest-bearing assets acquired is to be recognized as interest income.

20. Supervisory goodwill was recorded on the merged institution's balance sheet as an asset includable in capital under GAAP and under FHLBB's regulations governing the minimum capital requirements of FSLIC-insured thrift institutions. The ability to include supervisory goodwill as capital for purposes of satisfying FHLBB's minimum capital requirements and to amortize it over a lengthy period was essential to inducing healthy acquirer institutions to merge with insolvent or troubled FSLIC-insured thrifts. By assuring acquirer institutions in supervisory mergers that supervisory goodwill would be treated in the above-described manner for regulatory purposes, FSLIC and FHLBB were able to induce and arrange supervisory mergers with minimal cash contributions and other tangible financial assistance. FSLIC and FHLBB thus saved many billions of dollars in financial assistance that FSLIC would otherwise have had to pay in order to resolve scores of insolvent and troubled FSLIC-insured thrift institutions.

21. As part of its effort to induce and arrange supervisory mergers by using supervisory goodwill in the above-described manner, FHLBB took steps to assure the thrift industry that GAAP would control in determining the application of purchase method accounting and the treatment of supervisory goodwill in supervisory mergers. In August 1981, FHLBB withdrew a proposed rule change that would have

imposed regulatory standards more stringent than GAAP for accounting for supervisory goodwill. The proposed rule would have limited the inclusion of supervisory goodwill in regulatory capital to 30 percent of the merged institution's net worth and would have required that supervisory goodwill be amortized over a period no longer than ten years. In withdrawing the proposed rule, the FHLBB stated that a principal reason for its action was that the proposal could "discourage potential merger partners from consummating necessary mergers." In September 1981 FHLBB issued Memorandum R31b, which made clear that, as a matter of FHLBB policy, GAAP would control in determining the application of purchase method accounting and the treatment of supervisory goodwill in supervisory mergers.

22. FSLIC also realized savings over the cost of liquidating failed thrifts through the creation of "FSLIC capital contributions," a regulatory capital credit. If the amount of tangible financial assistance provided by FSLIC in connection with a supervisory merger was insufficient to restore the insolvent thrift's balance sheet to minimum regulatory capital levels, the acquisition would have a negative effect on the capital position of the acquirer institution. In order to eliminate or reduce this negative effect, while holding the cost of assistance and cash outlays to a minimum, FSLIC and FHLBB assured certain acquirer institutions that FSLIC financial assistance, or some portion thereof, would be treated as regulatory capital, recordable on the resulting institution's balance sheet for regulatory reporting purposes as a direct credit to capital under FHLBB's regulations governing the minimum capital requirements of FSLIC-insured thrift institutions. This practice deviated from GAAP, which required that such cash

contributions be charged against (and thus reduce) any goodwill arising out of the transaction. The ability to include these contributions as capital for purposes of satisfying FHLBB's minimum capital requirements was in some cases essential to inducing a healthy acquirer institution to merge with an insolvent or troubled FSLIC-insured thrift on the terms proposed by FSLIC and FHLBB. By assuring acquirer institutions in supervisory mergers that some or all of the FSLIC assistance would be treated in the above-described manner for regulatory reporting purposes, FSLIC and FHLBB were able to induce and arrange supervisory mergers with minimal cash payments and other tangible financial assistance. FSLIC and FHLBB thus saved large sums of financial assistance that FSLIC would otherwise have had to pay in order to resolve many insolvent and troubled FSLIC insured thrift institutions.

23. During the last 7 months of 1981, FSLIC provided tangible financial assistance (e.g. cash, FSLIC notes) in connection with the merger of 23 insolvent or troubled FSLIC-insured thrift institutions with assets totaling $12.3 billion. These 23 supervisory mergers were arranged at a present value cost to FSLIC of $663 million, or 18 percent of the estimated cost (at present value) of liquidation. Similarly, in 1982 FSLIC provided financial assistance in connection with 49 supervisory mergers involving 77 FSLIC-insured insolvent or troubled thrifts with assets totaling $31.2 billion. The present value cost to FSLIC of these supervisory mergers was $1.2 billion, or 16.3 percent of the estimated cost of liquidation. In effect, by using supervisory goodwill in accounting for supervisory mergers under the purchase method, FSLIC transferred much of its cost of resolving insolvent or failing thrifts to the healthy members of

the industry and their shareholders. As then-Chairman Pratt stated in March 1982: "[B]y using mergers as a supervisory tool ..., we are seeking to spread as much of the industry's own net worth as possible over the industry's trouble spots as a means of conserving the FSLIC's insurance fund."

24. In 1982 the Financial Accounting Standards Board, which promulgates GAAP, issued Statement of Financial Accounting Standards No. 72 ("FASB 72"), which amended GAAP applicable to mergers initiated after September 30, 1982. FASB 72 generally requires that goodwill be amortized over a period of far less than previously permitted by GAAP. This change in GAAP did not alter FHLBB's and FSLIC's regulatory policies and practices with regard to supervisory goodwill. For regulatory accounting purposes, FHLBB and FSLIC continued to induce healthy institutions to acquire failing thrifts by allowing goodwill to be included in capital and amortized over a period of time exceeding that now allowed by GAAP.

25. The nature of the problems affecting the thrift industry changed in 1983-1984. After mid-1982, market interest rates declined, thus improving the "negative spread" that had plagued the industry. But in 1983 and 1984 thrifts increasingly faced problems with deteriorating assets. This asset quality problem threatened many thrift institutions that were just recovering from the negative spread problems of 1981-82. Thirty-five percent of all FSLIC-insured thrifts lost money in the second half of 1983.

26. Although economic conditions improved in 1983, the number of problem cases and the volume of assets handled by FSLIC in default prevention transactions continued at record levels in that year. FSLIC resolved 53 problem cases involving $17.6 billion in

assets in 1983. This marked a decrease from 77 FSLIC resolved cases in 1982, but the complexity of the problem cases increased significantly. FSLIC realized significant cost savings by resolving most of these problem cases through interstate and inter-industry acquisitions. Through aggressive use of purchase method accounting, FSLIC saved an estimated $2.4 billion over the cost of liquidation in resolving these problem cases.

27. Overall thrift industry profitability declined in 1984, despite the fact that interest rates were far below the 1981-1982 levels. In 1984 FSLIC resolved 27 problem cases involving $5.5 billion in assets. The continued growth in the size and complexity of problem cases requiring FSLIC intervention, however, created a record-high demand on FSLIC resources, precipitating a decline in FSLIC reserves from $6.4 billion at the end of 1983 to approximately $5.6 billion at the end of 1984. During 1984, despite FSLIC's efforts to obtain less costly resolutions, FSLIC was forced to place 9 institutions into liquidating receiverships. The other 18 problem cases were resolved by FSLIC at approximately 45 percent of the estimated cost of liquidation, or a savings of $693 million, largely through the use of supervisory goodwill to induce healthy institutions to take over the failing thrifts.

28. In 1985 the size and complexity of cases requiring FSLIC assistance kept the demand on FSLIC resources at record levels. The FSLIC insurance fund was being depleted so quickly that FHLBB in 1985 levied quarterly special insurance premiums on insured institutions, adding more than $1 billion to the insurance fund. Even with the extraordinary assessment, FSLIC's total insurance reserves in 1985 decreased more than $1 billion, to

$4.6 billion. FSLIC resolved 35 problem cases in 1985 involving total assets of $6.5 billion. Twenty-five of these cases involved assisted acquisitions representing $4.4 billion in total assets. Through techniques such as interstate, inter-industry, and private-investor acquisitions, the 25 assisted acquisitions saved FSLIC $547 million over the estimated cost of liquidation. During 1985, FSLIC appointed a liquidating receiver for 10 institutions. Because of the continuing high case load and associated losses, FSLIC's need for capital remained intense at the end of 1985.

29. The intense need for FSLIC capital became urgent in 1986, when the total reserves for FSLIC diminished by year end to *negative* $6.3 billion. FHLBB's overriding concern during 1986 was the development of a plan to recapitalize the FSLIC insurance fund. In 1986 the gap between profitable thrifts and unprofitable ones widened, with approximately one-fifth of the institutions experiencing accelerating losses. FHLBB and FSLIC resolved 27 problem thrifts with assisted mergers and acquisitions in 1986, involving $7.4 billion in assets. FSLIC liquidated 10 institutions in 1986.

30. In 1987, the thrift industry's financial condition continued to deteriorate, as the industry reported an overall net loss of $6.8 billion. FSLIC's financial problems also worsened and, by the end of 1987, its reserves had plummeted to a *negative* $13.7 billion as it incurred operating losses of $8.6 billion for the year. Of the 48 FSLIC cases resolved in 1987 at an estimated cost of $4.5 billion, 31 were resolved by assisted sales, saving FSLIC $400 million over the cost of liquidation. While FSLIC's capitalization problems were somewhat eased in 1987 by the passage of the Competitive Equality Banking Act of

1987 ("CEBA"), which authorized the sale of bonds to recapitalize the FSLIC, by the end of 1987 there were still 259 problem institutions in the FSLIC caseload. The estimated cost of resolving these was $17.4 billion. The General Accounting Office estimated that an additional 300 institutions with assets of about $88 billion were insolvent under GAAP standards, thereby exposing FSLIC to further risk.

31. Recognizing this, the FHLBB continued to seek ways in which to facilitate supervisory acquisitions. For example, even though CEBA required generally that thrift institutions conform their accounting practices to GAAP, the FHLBB issued accounting regulations implementing CEBA which provided that accounting forbearances would continue to be included as a component of regulatory capital. 53 Fed. Reg. 324 (January 6, 1988). The rationale for the continued infusion of accounting forbearances was that such forbearances "have often been required to facilitate the acquisition of a troubled institution...." *Id.* at 332.

32. By the end of 1988, FSLIC's deficit had increased to $75 billion. It incurred a net loss of $66 billion for the year, and the thrift industry's net losses, at $13 billion, were almost double the year before. While FSLIC reported a $43.6 billion loss allowance for the estimated cost of resolving 578 problem thrifts that had not been resolved in 1988, it was able to dispose of 205 insolvent thrifts and stabilize 18 others by supplementing its CEBA bond receipts with FSLIC notes and long-term assistance agreements to attract acquirers of insolvent institutions. As FSLIC did not have the additional billions in cash to liquidate insolvent institutions and to pay off depositors, FSLIC arranged less expensive transactions with acquirer institutions through the use of

assistance agreements continuing provisions to cover the negative net worth of failed thrifts and to cover losses on nonperforming or poor quality assets.

THE TRANSACTIONS

33. On March 11, 1988, plaintiffs, through the newly formed Statesman Bank, purchased substantially all of the assets and assumed substantially all of the liabilities of First Federated Savings Bank, of West Palm Beach, Florida ("Federated"), from FSLIC, which had recently been appointed receiver for Federated. On that same date, March 11, 1988, Statesman Bank merged with First Federal Savings Bank of Waterloo Iowa ("First Federal"), Peoples Savings and Loan Association of Waterloo Iowa ("Peoples"), and The Perpetual Savings and Loan Association of Waterloo, Iowa ("Perpetual"). First Federal, Peoples, and Perpetual are sometimes hereinafter referred to as the "Waterloo Institutions." The acquisitions all took place in a supervisory transaction induced and arranged by FSLIC and FHLBB.

34. Federated was a stock savings bank organized under the laws of Florida, the accounts of which were insured by FSLIC. For the year ended December 31, 1987, Federated reported a net loss of over $7 million. This reported loss did not include various audit adjustments made during the year for additional charge-offs of approximately $32 million. By Resolution No. 88-167 dated March 11, 1988, FHLBB concluded that Federated was insolvent and appointed FSLIC receiver for Federated contingent upon receipt of approval from the Comptroller, Bureau of Thrift, Savings and Loan Section, of the

State of Florida pursuant to 12 U.S.C. 1729. The Comptroller provided such approval, and FSLIC was appointed receiver for First Federated that same date.

35. Prior to the merger, Perpetual was a mutual thrift chartered under the laws of Iowa, the accounts of which were insured by FSLIC. For the year ended December 31, 1987, Perpetual reported a net loss of $4.2 million. By Resolution No. 88-168 dated March 11, 1988, FHLBB concluded that Perpetual was insolvent and appointed FSLIC conservator for Perpetual contingent upon receipt of approval from the Superintendent of Savings and Loans of the State of Iowa pursuant to 12 U.S.C. 1729. The Superintendent of Savings and Loans of Iowa provided such approval, and FSLIC was appointed conservator for Perpetual that same date.

36. Prior to the merger, First Federal was a federally chartered mutual savings bank, the accounts of which were insured by FSLIC. For the year ended December 31, 1987, First Federal reported a net loss of $12.5 million. At the time of its merger into Statesman Bank, First Federal was insolvent.

37. Prior to the merger, Peoples was a federally chartered mutual savings and loan association, the accounts of which were insured by FSLIC. For the year ended December 31, 1987, Peoples reported net loss of $4.4 million. At the time of its merger into Statesman Bank, Peoples was insolvent.

38. In 1987, the Statesman Group explored the possibility of acquiring a subsidiary of Federated with assistance from FSLIC. In discussions with FSLIC thereafter, FSLIC "packaged" Federated with the three Waterloo Institutions, and requested bids from others for the potential acquisition of the four institutions.

39. On January 8, 1988, plaintiffs submitted a proposal ("Proposal") to acquire the four institutions. The Proposal made clear that plaintiffs were not content to rely on FHLBB's policies regarding certain aspects of the transaction, as it specified many of the conditions of the proposed acquisitions. The Proposal called for the formation and capitalization of SSHC and Statesman Bank. The initial capital infusion by plaintiffs into SSHC was to be $21 million, of which $12.6 million was to be contributed by Statesman Group in the form of Statesman Group preferred stock, and $8.4 million was to be cash contributed by American Life. SSHC was to infuse all of the preferred stock and cash into Statesman Bank. Statesman Bank was to be organized and chartered by FSLIC, and then turned over to SSHC to be a wholly-owned subsidiary of SSHC. The Proposal called for assistance from FSLIC in the fore of cash and a promissory note in the total amount of the combined deficit of the four failed associations, with adjustments. FSLIC was also to guarantee partial reimbursement of losses on certain Covered Assets, to provide payments for spread and yield maintenance on certain covered assets, and to provide indemnification against certain losses.

40. The Proposal also spelled out certain regulatory considerations and forbearances. First, the Proposal made clear that the purchase method of accounting was to be used, and that $21 million of the FSLIC cash contribution was to be a "capital credit" and would thus become a permanent part of Statesman Bank's regulatory net worth. Specifically the Proposal stated:

> For regulatory purposes, with respect to the books and records of [Statesman Bank], push-down accounting shall be used to record the purchase of [Statesman Bank's] capital stock by SSHC. Twenty-one million of the cash contribution to be made to [Statesman Bank] pursuant to an assistance agreement to be entered into between the FSLIC and Statesman [Group] is to be a credit to [Statesman Bank's] regulatory capita; therefore, for regulatory accounting purposes, [Statesman Bank] will book such contribution as a direct addition to its net worth. Accordingly, immediately after the acquisition, the regulatory capital of [Statesman Bank] will be $42,000,000, which will consist of $21,000,000 in capital infused by SSHC, plus $21,000,000 in capital contributed by the FSLIC which will be treated as regulatory capital. Not later than 30 days following the acquisition, [Statesman Bank] shall submit to the Supervisory Agent an opinion of independent certified public accountants that [Statesman Bank] has accounted for the transaction in accordance with generally accepted accounting principles ("GAAP") including the use of "push down" accounting, except that as provided by the Board, for purposes of reporting to the Board, twenty-one million dollars of the cash contribution by the FSLIC to [Statesman Bank] pursuant to the assistance agreement shall be deemed a contribution to regulatory net worth and will be booked as a direct credit to [Statesman Bank].

41. The Proposal called for additional regulatory considerations and forbearances, including a regulatory capital maintenance agreement, waiver of certain debt restrictions that may apply to Statesman Group, authorization of certain cross-marketing activities by

plaintiffs, and other considerations and forbearances. Many of these considerations and forbearances were required to provide for waivers of regulatory restrictions on companies such as Statesman Group and American Life, which were engaged in the insurance business, to acquire a controlling interest in a thrift institution. All regulatory forbearances, including the insistence of purchase method accounting and the requirement of the permanent capital credit, were integral to the acquisitions and without which the transactions would have been nonsensical.

42. Attached as Appendix E to the Proposal was a letter from the independent accounting firm of Ernst and Whinney, which concluded that, "the proposed use of the purchase method of accounting will be in accordance with [GAAP]." The letter went on to state that the Statesman Group's "proposal presents the $25 million excess of liabilities assumed over the estimated fair value of assets acquired as an unidentified intangible," [i.e., goodwill].

43. The Proposal incorporated by reference the plaintiffs' Business Plan. The Business Plan made clear that the purchase method of accounting was integral to the proposal, as it stated that, "[t]he projected financial statements have been prepared with purchase accounting being applied by use of the 'Push-Down' method. Inasmuch as the acquisition does not give rise to continuity of ownership, Statesman believes that application of the purchase method is appropriate and is in accordance with [GAAP]." The Business Plan also expressly stated that it was "based upon the assumption that certain regulatory forbearances and considerations will be granted," and stressed that the forbearances were "necessary to consummate the transaction." The Business Plan contained projected statements of

condition, which indicate that the $21 million of the cash contribution from FSLIC was to be treated as permanent regulatory capital of Statesman Bank and not subject to reduction through amortization. The notes to the projections made clear that the purchase method of accounting was a major assumption on which the entire proposal was based:

> (3) *Accounting for the Acquisition*
>
> The accompanying projected financial statements have been prepared assuming purchase accounting is applied to record the acquisition of the Bank and that purchase accounting is applied by the "push down" method as of December 31, 1987. Purchase accounting is the method of recording a business acquisition by adjusting assets and liabilities to market value and eliminating net worth. "Push-down" refers to recording the adjustments on the books of the acquired company.

The Business Plan expressly contemplated that Statesman Bank would record on its books "[g]oodwill of approximately $25.8 million arising from the acquisition...."

44. Plaintiffs also submitted to FSLIC an Application H-(e)1 ("Application") for approval of the acquisition of the banks, dated February 12, 1988. The Application incorporated the Proposal and the Business Plan. In additional, the Application made clear that, "the Acquisition Proposal is subject to a number specific terms and conditions, among which are certain regulatory forbearances and considerations to be granted or obtained by the FSLIC.... Applicant wishes to emphasize the importance of the requested forbearances and considerations to the

completion of the Acquisition...." The Application also summarized the specified conditions, stressing that,

> [f]or regulatory purposes with respect to the books and records of [Statesman Bank], push-down accounting shall be used to record the purchase of [Statesman Bank's] capital stock by the Holding Company. Twenty-one million dollars of the cash contribution to be made to [Statesman Bank] pursuant to an assistance agreement to be entered into between the FSLIC and Applicant is to be a credit to [Statesman Bank's] regulatory capital; therefore, for regulatory accounting purposes, [Statesman Bank] will book such contribution as a direct addition to its net worth.

The Application did not even refer to the possibility that the $21 million capital credit would be amortized.

45. The Application also reiterated several other regulatory considerations and forbearances that were integral to the transaction. On March 1, 1988, plaintiffs amended their Application H-(e)1 in certain respects, but did not amend any aspect of the proposal affecting the use of the purchase-method accounting or of the $21 million capital credit.

46. The purchase method of accounting and the capital credit for $21 million of the FSLIC cash contribution were integral to plaintiffs' bid. Had plaintiffs not been permitted to record as capital the supervisory goodwill in the amount by which the acquired institution's liabilities exceeded their assets in addition to the $21,000,000 of FSLIC assistance, plaintiffs' acquisition of the institutions on the financial terms proposed would have rendered the entire transaction senseless. Had Statesman Bank not been permitted to record supervisory goodwill and

the $21 million of FSLIC assistance as regulatory capital, it would have been considered insolvent for regulatory purposes on the date of the acquisition, and thus immediately subject to liquidation by FHLBB and FSLIC. Plaintiffs would not have made such a proposal. Nor would they have made a proposal which did not include the other requested regulatory considerations and forbearances. Thus, plaintiffs' willingness to enter into the supervisory transaction on the financial terms set forth in the Proposal was absolutely conditioned on FHLBB's and FSLIC's agreement to permit plaintiffs to report supervisory goodwill as capital, and to report the $21 million of FSLIC assistance as a permanent credit to the capital of Statesman Bank for regulatory purposes. Absent all of the specified regulatory considerations and forbearances, plaintiffs either would have insisted upon receiving far greater tangible financial assistance from FSLIC, such as additional cash contributions or promissory notes, or would have withdrawn their offer.

47. FSLIC and FHLBB determined that plaintiffs' bid was the most attractive solution for the four insolvent institutions. The parties negotiated and agreed upon several of the terms and conditions of the transaction, set forth below. After FSLIC and FHLBB selected plaintiffs' bid, FHLBB and FSLIC organized and chartered Statesman Bank, and caused it to issue common stock to SSHC at closing. Statesman Bank entered into a separate Merger Agreement and Plan of Merger ("Merger Agreement") with each of the three Waterloo Institutions. Each of the Merger Agreements was expressly conditioned upon the execution of an Assistance Agreement among FSLIC, Statesman Bank, Statesman Group, American Life, and SSHC.

48. Statesman Bank also entered into an Acquisition Agreement with FSLIC as receiver for Federated, under which Statesman Bank agreed to purchase substantially all of the assets, and to assume substantially all of the liabilities, of Federated. The Acquisition Agreement stated that computations made for purposes of the acquisition would be governed by GAAP, except that where GAAP conflicted with any action, regulations or resolutions of FHLBB and FSLIC, then the action, regulation or resolution would prevail over GAAP. The Acquisition Agreement also incorporated FHLBB Resolutions adopted contemporaneously with the Acquisition Agreement.

49. FSLIC and all of the plaintiffs entered into an Assistance Agreement pertaining to the transaction. Under the Assistance Agreement, FSLIC agreed to contribute $60 million to Statesman Bank. The Assistance Agreement states that $26 million of the $60 million cash contribution from FSLIC was to be considered part of Statesman Bank's regulatory capital. In addition, under the Assistance Agreement, FSLIC delivered a Promissory Note in the amount of the difference between the acquired associations' negative regulatory capital and the $60 million cash provided by FSLIC. Also under the Assistance Agreement, Statesman Bank delivered to FSLIC a Subordinated Debenture in the face amount of $5 million at a term of ten years. The Assistance Agreement provided that it "shall be governed by GAAP, except that where such principles conflict with the terms of the Agreement, applicable regulations of the Bank Board or [FSLIC], or any resolution or action of the Bank Board approving or relating to the Acquisition, the Mergers or to this Agreement, then this Agreement, such regulations, or such

resolution or action shall govern." The Assistance Agreement also provided for continuing FSLIC assistance on certain Covered Assets on which FSLIC was to assume 93 percent of losses.

50. Also on March 11, 1988, plaintiffs entered into a Regulatory Capital Maintenance Agreement with FSLIC, under which plaintiffs agreed that Statesman Bank would maintain the regulatory capital of the Bank in compliance with regulatory capital requirements. Section 2 of that Agreement defined regulatory capital to include "amounts permitted by the FSLIC in the Assistance Agreement and in the forbearances issued in connection with the transactions discussed herein." The Regulatory Capital Maintenance Agreement provided that the computations of regulatory capital "shall be perpetual." Under that Agreement, Statesman Group and American Life guaranteed to infuse up to $4 million of capital into Statesman Bank and SSHC as necessary to maintain Statesman Bank's regulatory capital at required levels. Also, under the Regulatory Capital Maintenance Agreement plaintiffs granted FSLIC voting rights for the stock of SSHC, to be exercised in the event that Statesman Bank failed to satisfy minimum regulatory capital requirements.

51. The Assistance Agreement and the Regulatory Capital Maintenance Agreement incorporated the Resolutions of the Bank Board issued in connection with the acquisitions. One of the Resolutions issued by FHLBB, Resolution No. 88-169, recited that the transfer of the assets and liabilities of Federated as provided for in the Acquisition Agreement "is the most desirable alternative, consistent with Bank Board and FSLIC policy, to the liquidation of [Federated] and the payment of insurance on its accounts...." The Resolution also determined that

each of the acquired associations was a "failing institution," that the acquisition of Federated and the mergers of the Waterloo Institutions "would lessen the risk to the FSLIC," that "no other offer was made to acquire all of the Associations," that there was no other qualified offeror who presented an acceptable offer "the estimated cost of which was within the lesser of 15 percent or $15 million of the cost of the offer of the Applicants to acquire all of the associations," that plaintiffs' bid "presents the lowest expense and least risk to the FSLIC of any proposal submitted for any of the Associations," and that "the offer of the Applicants is substantially less costly to the FSLIC than any alternative proposal or proposals." FHLBB further found that "financial assistance and indemnification by the FSLIC are necessary to prevent the default of each Association and to facilitate the Acquisition and the Mergers."

52. The Resolution approved the Assistance Agreement, the Promissory Note, the Subordinated Debenture, and the forbearances from regulatory requirements.

53. With respect to the acquisition of Federated's assets and liabilities and the mergers of the Waterloo Institutions, FHLBB resolved that Statesman Bank shall report to FHLBB and FSLIC that the transactions were accounted for in accordance with GAAP as interpreted by FHLBB and FSLIC regulations, but specifically noted two departures from GAAP: (a) that the $21 million contribution by FSLIC and the $5 million principal amount of the Subordinated Debenture issued to FSLIC "shall be credited to the regulatory capital account of" Statesman Bank; and (b) that goodwill could be amortized over a period of up to 25 years. FHLBB further resolved that Statesman Bank shall furnish an independent certified

accountant's opinion within 90 days following the effective date which shall "indicate that the Acquisition and the Mergers were consummated in accordance with [GAAP] except as otherwise authorized by the Bank Board," and

> which shall (a) specifically describe, as of the Effective Date, any intangible assets, including goodwill and the discount and premiums arising from the Acquisition and the mergers, to be recorded on [Statesman Bank's] books, and (b) substantiate the reasonableness and conformity with regulatory requirements of the amounts attributed to intangible assets, including goodwill and the discounted premiums, and the related amortization periods and methods....

54. At closing FHLBB issued to Statesman Bank a forbearance letter which set forth eleven enumerated regulatory forbearances that had been negotiated and agreed upon by plaintiffs and FHLBB, and which are part of the parties' contractual commitments. The forbearance letter included FHLBB's agreement (a) not to enforce for five years regulatory capital deficiencies arising from specified items, including the acquired associations' liabilities and net worth deficiency, and (b) to include $21 million of FSLIC's contribution, and the $5 million face amount of the Subordinated Debenture, in Statesman Bank's regulatory capital.

55. In accordance with the agreements of the parties, at closing FSLIC issued to Statesman Bank a promissory note of $43 million which has subsequently been adjusted to a principal amount of over $55 million. Statesman Bank also issued to FSLIC a Subordinated Debenture in the face amount of $5 million.

56. The purchase of Federated's assets and the assumption of its liabilities, and the supervisory mergers of the Waterloo Institutions, were all consummated on March 11, 1988 in accordance with the terms and conditions set forth in the items described above.

57. In reliance upon FSLIC's and FHLBB's express contractual agreement concerning the use of purchase-method accounting, the acquired assets and liabilities of Federated, Perpetual, Peoples, and First Federal were adjusted to fair market value at the time of the transactions, and the resulting excess of liabilities over acquired assets was recorded on Statesman Bank's books as an intangible asset to be included in capital and amortized in accordance with FASB 72. The amount of supervisory goodwill ultimately recorded by Statesman Bank as a result of the acquisitions was $27,874,583. Also in reliance on FHLBB's and FSLIC's express agreements, Statesman Bank recorded as regulatory capital the $21 million of FSLIC assistance and the $5 million face amount of the Subordinated Debenture. In financial reports filed with FSLIC and FHLBB since the transaction, Statesman Bank has consistently reported these items as assets included in capital for regulatory purposes, in accordance with and in reliance upon, FSLIC's and FHLBB's express agreement. In accordance with the agreements with FSLIC and FHLBB, Statesman Bank has not amortized the $21 million capital credit in its reports to FHLBB. FHLBB objected to Statesman Bank's failure to amortize the capital credit, despite its agreement that the capital credit shall be perpetual. Other than this objection, prior to the enactment of FIRREA, neither FSLIC nor FHLBB objected to Statesman Bank's regulatory accounting treatment of these items.

58. FLSIC and FHLBB benefited enormously from the use as regulatory capital of supervisory goodwill, the capital credit of $21 million, and the $5 million face amount of the Subordinated Debenture in connection with the acquisition of Federated's liabilities and assets, and the mergers of the Waterloo Institutions. As of December 31, 1987, the four failed institutions reported an aggregate negative net worth of $90.2 million. If these figures were adjusted to reflect the fair market value of the assets and liabilities, the difference between the liabilities and assets would exceed the aggregate negative net worth of the institutions. Indeed, the initial audit reports (before the GAAP purchase accounting mark to market entries), currently in the process of finalization, detail the negative regulatory net worth of the four institutions at an amount in excess of $115 million in the aggregate. When the failed thrifts' assets and liabilities were later marked to market, Statesman Bank ultimately recorded the difference as supervisory goodwill in the amount of $27,874,583. This figure did not include FSLIC's exposure of 93 percent of the losses on Covered Assets under the Assistance Agreement. If all of the Covered Assets of the four failed thrifts had been included in the mark to market analysis, the difference between the fair market value of the four thrifts' assets and liabilities would have increased by more than $30 million. Thus, the cost of liquidating the four institutions would have exceeded the sum of (a) the aggregate negative regulatory capital of $115 million, (b) the goodwill of $27.9 million, and (c) $30 million as the allowance for loss on the remaining 93 percent of Covered Assets, for a total of $172.9 million. Even this figure is a conservative estimate of the cost of liquidation, in light of operating losses, deterioration of asset

quality, deposit outflows, and resolution costs such as brokerage fees, holding costs, etc.

59. Indeed, in a Statement Before the Committee on Banking, Housing and Urban Affairs of the United States Senate dated May 26, 1988, M. Danny Wall, then Chairman of FHLBB, praised many aspects of the Statesman transaction, stating that "the financial assistance provided by the FSLIC in connection with these acquisitions was $50 million less than the cost to FSLIC of liquidating the four institutions." Mr. Wall referred to the transaction as "one of the more significant acquisitions arranged by FSLIC," and stated that it was "noteworthy not only for the number of institutions involved," but also because FHLBB granted forbearances as to cross-marketing of products and services between subsidiaries of Statesman Group and Statesman Bank. Mr. Wall stated that any restrictions on cross-marketing "would have been a material impediment" to a transaction worth $50 million to the government.

60. Plaintiffs have complied in good faith with all the terms and conditions of the agreements relating to the acquisition of the four institutions and have otherwise fully performed their undertakings in connection therewith.

61. Plaintiffs' acquisitions of and investment in Federated and the Waterloo Institutions were made in reliance upon FHLBB's and FSLIC's policies and statements encouraging and approving the use of the purchase method of accounting and the inclusion of goodwill, the $21 million capital credit and the $5 million face amount of the Subordinated Debenture in capital for regulatory reporting purposes. FHLBB and FSLIC were fully aware of plaintiffs' reliance on these policies and statements, and well knew or should have known that none of the plaintiffs would

acquire or invest in Federated and the Waterloo Institutions absent the specified regulatory accounting treatment of goodwill, the $21 million regulatory capital credit, and inclusion of the $5 million face amount of the Subordinated Debenture in regulatory capital.

62. The parties' agreement concerning the use of supervisory goodwill, the permanent capital treatment of the $21 million capital credit, and the inclusion of the $5 million face amount of the Subordinated Debenture were essential terms and conditions of the transaction, and were essential to the parties' purpose of allowing plaintiffs a reasonable opportunity to turn the four failed thrifts into a profitable venture. Plaintiffs would not have agreed to acquire the four failed thrifts in the absence of such regulatory accounting treatment, because Statesman Bank would have been left insolvent and because Statesman Bank would otherwise have been unable to manage itself without substantial regulatory oversight that would interfere with its business and prospects.

STATESMAN BANK'S POST-MERGER PERFORMANCE

63. Plaintiffs' acquisition of the four failed institutions prevented their default and liquidation, thus saving the FSLIC insurance fund, by FHLBB's admission, $50 million. Since the acquisition, Statesman Bank has performed well, achieving the purposes of the acquisitions. Statesman Bank has resolved problem loans, eliminated non-performing assets, and operated soundly. In human terms, the value of plaintiffs' success cannot be measured. By preventing

the liquidation of the four institutions, the acquisitions not only saved FSLIC millions of dollars, they saved the jobs of hundreds of people and preserved important services for thousands of savers, home buyers, and other customers in the communities served by the insolvent thrifts.

64. FSLIC's and FHLBB's contractual promises, for which plaintiffs provided substantial consideration and on which they detrimentally relied in fully performing their obligations under their agreements with FSLIC and FHLBB, entitled Statesman Bank to record supervisory goodwill, the $21 million capital credit, and the $5 million face amount of the Subordinated Debenture as credits to capital for purposes of defendants' regulatory capital requirements. These contractual promises also entitled Statesman Bank to report the $21 million capital credit as perpetual capital that need not be amortized. Plaintiffs' contract rights arising out of the above-described agreements with FSLIC and FHLBB constitute property within the meaning of the Fifth Amendment to the United States Constitution.

FIRREA

65. FIRREA was signed into law by President Bush on August 9, 1989. Section 301 of FIRREA required the Director of OTS to promulgate, no later than November 7, 1989, final regulations establishing minimum capital requirements for federally insured thrifts. These minimum capital requirements became effective on December 7, 1989, and require federally insured thrifts to:

(a) maintain "tangible capital," which excludes intangible assets including supervisory goodwill, in an amount not less than 1.5 percent of the thrift's assets;
(b) maintain "core capital," as defined in the statute, in an amount not less than 3 percent of the thrift's assets; and,
(c) maintain "risk-based capital" in an amount not materially less than that required by the Comptroller of the Currency for national banks.

66. FIRREA provides that "tangible capital" shall not include intangible assets and supervisory goodwill, and that only limited amounts of "core capital" may be made up of supervisory goodwill. Prior to January 1, 1992, the amount of supervisory goodwill includable in core capital may not exceed 1.5 percent of total assets. Thereafter, the amount of supervisory goodwill (as a percentage of assets) includable in core capital declines each year, in accordance with the following schedule:

January 1, 1992, to December 31, 1992 .... 1.0 percent
January 1, 1993, to December 31, 1993 .... 0.75 percent
January 1, 1994, to December 31, 1994 .... 0.375 percent
Thereafter ..... 0 percent

For purposes of the minimum capital requirements, supervisory goodwill must be amortized over a period not to exceed 20 years.

67. FIRREA does not abrogate contracts and forbearances of FHLBB and FSLIC, and indeed provides that all orders, resolutions, determinations and regulations of FHLBB and FSLIC shall continue

in effect and be enforceable against OTS and FDIC. FIRREA does not exclude FSLIC capital contributions on the face amount of Subordinated Debenture from capital for purposes of determining compliance with any of the minimum capital requirements, at least where governed by contrary contractual provisions and forbearances. Nor does FIRREA require that supervisory goodwill be excluded from capital for purposes of determining compliance with minimum "risk-based" capital requirements.

68. FIRREA also requires the Director of OTS to enforce the following restrictions against federally insured thrifts that do not meet the minimum capital standards promulgated under FIRREA:

(a) After January 1, 1991, the Director must prohibit the asset growth of any federally insured thrift not in compliance with regulatory capital standards, except that the Director may approve a "limited growth exception" upon specified conditions. In addition, the Director may restrict the asset growth of any such thrift at any time prior to January 1, 1991.

(b) As of January 8, 1990, the Director required thrifts that do not meet minimum capital standards under FIRREA to submit a plan ("capital plan") that (1) addresses the thrift's need for increased capital under FIRREA; (2) describes the manner in which the thrift will increase its capital to achieve the minimum capital standards; (3) specifies types and levels of activities the thrift will engage in; (4) requires any increase in assets to be accompanied by specified increases in tangible and risk-based capital; and, (5) is

acceptable to the Director. The Director must treat any material failure to comply with such a plan as an unsafe and unsound practice.

(c) After January 1, 1991, the Director *must* require federally insured thrifts that do not meet minimum capital standards under FIRREA to comply with a capital directive which may include restrictions on the payment of dividends and on compensation, as the Director determines to be appropriate. FIRREA permits, but does not require, the Director to exempt thrifts from receipts of a capital directive in certain circumstances.

69. The Director may impose other restrictions on federally insured thrifts that do not meet minimum capital standards promulgated under FIRREA:

(a) The Director, in his discretion, may treat any thrift's failure to maintain capital at minimum regulatory levels as an unsafe or unsound practice subjecting the thrift to a range of further actions by the Director, including, among other things, issuance of cease and desist orders, appointment of a conservator or receiver, and suspension or removal of officers and directors.

(b) Such thrifts also must notify the Director of the proposed addition of any individual to the board of directors or of the employment of any individual as a senior executive officer of the thrift 30 days before such addition or employment becomes effective, and the Director may before the end of that 30 days disapprove the addition or employment.

70. FIRREA does not define "goodwill" or "supervisory goodwill."

OTS CAPITAL REGULATION

71. On November 8, 1989, OTS published minimum capital regulations ("OTS capital regulation") pursuant to FIRREA. The OTS capital regulation became effective on December 7, 1989.

72. In accordance with FIRREA, the OTS capital regulation establishes a minimum "tangible" capital requirement of 1.5 percent of total assets and a minimum "core" capital requirement of 3 percent of total assets. Supervisory goodwill cannot be counted as "tangible" capital at all, and can be counted as "core" capital only in accordance with the phase-out schedule set forth in FIRREA (see paragraph 66 above).

73. FIRREA does not require that supervisory goodwill be excluded from capital for purposes of determining compliance with minimum "risk-based" capital requirements. Nonetheless, the OTS capital regulation permits the inclusion of supervisory goodwill in capital for purposes of the minimum "risk-based" capital requirement only in accordance with the phase-out schedule set forth in FIRREA for determining compliance with the minimum "core" capital requirement (see paragraph 66 above).

74. Under the OTS capital regulation, the $21 million dollar capital credit, which the parties had agreed would be fully includable in Statesman Bank's regulatory capital without reduction through amortization, is considered "qualified supervisory goodwill." Therefore, it is excluded completely from Statesman Bank's tangible capital, and only limited amounts may be used to satisfy Statesman Bank's core and risk-based capital requirements.

75. Under FIRREA and the OTS capital regulation, the $5 million face amount of the Subordinated

Debenture, which the parties had agreed would be fully includable in Statesman Bank's regulatory capital, is considered "supplementary capital." Under that designation only portions of that amount are includable to satisfy Statesman Bank's risk-based capital requirement, and the amount is entirely excluded from Statesman Bank's tangible and core capital requirements.

76. Apart from the requirements and restrictions imposed by FIRREA on federally insured thrift institutions that fail to meet minimum capital requirements, the OTS capital regulation mandates a variety of additional consequences. For example, in addition to submitting a capital plan for achieving compliance with the minimal capital requirements, a noncomplying thrift must, under the OTS capital regulation, certify that while the plan is under review by OTS, it will not (absent OTS approval) (1) grow beyond net interest credited, (2) make any capital distributions, or (3) act inconsistently with any other limitations on activities established by statute, regulation, or by OTS in supervisory guidance. If a plan is not approved by OTS, the submitting thrift "shall immediately and without any further action" refrain from increasing its assets beyond the amount held on the day it receives notice of the disapproval and comply with any other restrictions or limitations set forth in OTS's written disapproval of the plan. The OTS capital regulation further provides that OTS may, "though enforcement proceedings or otherwise," require any thrift that fails to meet any of its regulatory capital requirements to take one or more of the following corrective actions:

(a) increase the amount of its regulatory capital to a specified level or levels;

(b) convene a meeting or meetings with the OTS supervision staff for the purpose of accomplishing the objectives of this section;
(c) reduce the rate of earnings that may be paid on savings accounts;
(d) limit the receipt of deposits to those made to existing accounts;
(e) cease or limit the issuance of new accounts of any or all classes or categories, except in exchange for existing accounts;
(f) cease or limit lending or the making of a particular type or category of loan;
(g) cease or limit the purchase of loans or the making of specified other investments;
(h) limit operational expenditures to specified levels;
(i) increase liquid assets and maintain such increased liquidity at specified levels; or
(j) take such other action or actions as the Director may deem necessary or appropriate for the safety and soundness of the savings association, or the depositors or investors in the savings association.

On or after January 1, 1991, these restrictions, "and any other restrictions the Director [of OTS] determines appropriate," may be included in a "capital directive" issued by the Director against a noncomplying thrift. Finally, according to the OTS capital regulation, OTS must treat as an unsafe and unsound practice "any material failure by a savings association to comply with any plan, regulation, written agreement undertaken or order or directive issued to comply with the requirements of [the capital regulation]."

77. In "Thrift Bulletin 36," now effective, OTS specified that acceptance of a capital plan submitted

by a noncomplying thrift will be predicted on certain additional stringent conditions, including among others:

(a) The management and the board of directors must execute an operating agreement which may provide, among other things, that if specific targets within the plan are not met or the thrift takes any action that does not comport with the plan, certain activities will be significantly restricted, a consent to merge agreement will be executed, or management and the board of directors will resign.
(b) The board of directors and senior management for the thrift must file an amendment, acceptable to the OTS District Director, to the capital plan within 15 days following an event or circumstance that materially affects the validity of the capital plan or its underlying assumptions. At a minimum, the capital plan must be reviewed and revised as necessary on an annual basis.
(c) The thrift must submit to the OTS District Director, within 20 days following the close of each calendar quarter, quarterly variance reports comparing actual capital to the targets established in the capital plan. Failure to file such variance reports shall constitute an unsafe and unsound practice. Variances that the District Director deems to be material may be grounds for revoking acceptance to the capital plan.

78. According to Thrift Bulletin 36, a thrift that fails to comply with any of its minimum capital requirements will be deemed to be in noncompliance

upon "adoption" of the OTS capital regulation, rather than upon the rejection of any capital plan submitted by the thrift.

79. Thrift Bulletin 36 recognizes that, apart from the specific restrictions set forth in FIRREA and the OTS capital regulation, there are a significant number of related OTS regulations, rule, and policy statements that limit or restrict a variety of essential business activities, (e.g., payment of dividends, establishment of branches, receipt of Federal Home Loan Bank advances, investments in securities and real estate) by thrifts that do not meet minimum capital requirements. Thrift Bulletin 36 requires that thrifts "request and receive approval of specific, express exemptions" from the operation of such related regulations "as part of the capital plan to be deemed in capital compliance."

THE IMPACT OF FIRREA AND THE OTS REGULATION

80. As of September 30, 1989, prior to the effective date of FIRREA and the OTS capital regulation, Statesman Bank's regulatory capital was $53.2 million—$15.8 million in excess of its required minimum of $37.4 million. As of that date, Statesman Bank reported supervisory goodwill and other intangible assets in the amount of $24,077,000, and fully included the OTS capital credit of $21 million and the $5 million face amount of the Subordinated Debenture in its regulatory capital. Statesman Bank does not satisfy the three new capital standards of FIRREA and the OTS capital regulation. As of December 31, 1989, after the OTS capital regulation became effective, Statesman Bank reported tangible capital of

negative $2.8 million ($11.8 million less than the required level of $9 million); core capital of $6.8 million ($11.2 million less than the required level of $18 million); and risk-based capital of $13.7 million ($10 million less than the required level of $23.7 million). If Statesman Bank were permitted to record as regulatory capital its remaining supervisory goodwill, the $21 million capital credit, and the $5 million face amount of the Subordinated Debenture, it would have reported as of December 31, 1989, tangible capital of $23.2 million, core capital of $32.8 million, and risk-based capital of $36.5 million. Therefore, but for the provisions of FIRREA and the OTS capital regulation restricting the inclusion of these items in capital—restrictions that violate plaintiffs' agreements with FSLIC and FHLBB—Statesman Bank would satisfy each of the three capital requirements. Accordingly, Statesman Bank is subject to restrictions and penalties relating to FIRREA's capital requirements solely because of the repudiation of FSLIC's and FHLBB's agreements with plaintiffs.

81. On January 5, 1990, Statesman Bank submitted a capital plan together with a proposed modification and extension of the March 1988 acquisition agreements. On March 13, 1990, OTS denied Statesman Bank's capital plan. OTS notified Statesman Bank that it must comply with OTS' policy statements set forth in bulletin RB3a-1, under which Statesman Bank would not be permitted to make any new loans or investments without the prior written approval of the District Director of OTS. After negotiations with the OTS District Director, Statesman Bank was granted only limited exceptions to those restrictions.

82. Under the restrictions outlined above, Statesman Bank was subject to substantial competitive disadvantage in the marketplace for loans deposits.

Statesman Bank—on pain of the full range of regulatory economic sanctions, from cease and desist orders to receivership and liquidation—was subjected not only to OTS's close supervisory scrutiny, but to its direction and control regarding virtually all of its business operations. Statesman Bank's managerial discretion, which has produced a record of conservative, sound and efficient management, was greatly circumscribed. In addition, the collateral consequences of the restrictions imposed by FIRREA and the OTS capital regulation were equally damaging. For example, Statesman Bank's ability to attract and retain deposits, as well as its ability to borrow in capital markets, was impaired. The restrictions also reduced Statesman Bank's ability to generate mortgages and other loans, reduced its access to secondary mortgage markets, and impaired its ability to generate profits. The asset growth restrictions reduced Statesman Bank's ability to obtain the advantages of growth available to thrifts, banks, and other financial institutions competing with it for the provision of mortgages and other loans and services in its market area. Moreover, the restrictions imposed under FIRREA and the OTS capital regulation impaired Statesman Bank's ability to serve the needs of savers and home buyers in its market area. In these and countless other ways, Statesman Bank was denied the benefits of including its supervisory goodwill, the $21 million capital credit and the $5 million face amount of the Subordinated Debenture in capital for purposes of complying with regulatory capital requirements—benefits that plaintiffs contracted for in their agreements with FSLIC and FHLBB.

83. In essence confirming that the purpose of the Statesman Bank acquisition had been frustrated, on July 26, 1990, the Director, OTS concluded that

> the [Statesman Bank] is in an unsafe and unsound condition to transact business due to having substantially insufficient capital in that the [Statesman Bank] has negative tangible capital, and ... the [Statesman Bank] has incurred or is likely to incur losses that will deplete all or substantially all of its capital ...

As a result, the Director, OTS appointed the Resolution Trust Corporation ("RTC") as receiver for Statesman Bank. On that same date, OTS formed a new institution, Statesman Federal Savings Bank, to take over all of the assets and liabilities of Statesman Bank, and appointed RTC as conservator of that new institution. On July 27, 1990, RTC took possession of Statesman Bank. This action caused additional significant harm to the reputation of the SSHC, Statesman Group, and American Life in financial and other communities, and otherwise severely impaired their ability to conduct their operations in a profitable manner free from burdensome and costly government interference.

84. Thus, the repudiation of FSLIC's and FHLBB's contractual promises frustrated the very purpose of the acquisition of Statesman Bank: the conversion of four failed thrifts into a sound, profitable institution serving the financial needs of the community.

85. Prior to the appointment of a receiver for Statesman Bank by OTS, on June 6, 1990, plaintiffs filed a complaint in the United States District Court for the District of Columbia seeking, on contractual and constitutional grounds, to enjoin OTS and FDIC from abrogating their contractual commitments to include supervisory goodwill, the $21 million capital credit and the $5 million face amount of the Subordinated Debenture in regulatory capital, or,

alternatively, to have the transaction rescinded and otherwise restore the parties to the *status quo ante*. On August 15, 1990, plaintiffs dismissed this district court action without prejudice.

COUNT I

86. Plaintiffs incorporate paragraphs 1 through 84.

87. The provisions of FIRREA and the OTS capital regulation restricting the inclusion of supervisory goodwill, the $21 million capital credit and the $5 million face amount of the Subordinated Debenture in Statesman Bank's capital for purposes of satisfying regulatory capital requirements constitute a repudiation and abrogation of plaintiffs' contract rights, as described above, and effect a taking of plaintiffs' property without just compensation, in violation of the Fifth Amendment to the United States Constitution.

COUNT II

88. Plaintiffs incorporate paragraphs 1 through 86.

89. The provisions of FIRREA and the OTS capital regulation restricting the inclusion of supervisory goodwill, the $21 million capital credit and the $5 million face amount of the Subordinated Debenture in Statesman Bank's capital for purposes of satisfying the regulatory capital requirements constitute a repudiation and abrogation of contract rights, as described above, and effect a deprivation of plaintiffs property without due process of law, in violation of the Fifth Amendment to the United States Constitution.

COUNT III

90. Plaintiff incorporate paragraphs 1 through 88.

91. The provisions of FIRREA and the OTS capital regulation restricting the inclusion of supervisory goodwill, the $21 million capital credit and the $5 million face amount of the Subordinated Debenture in Statesman Bank's capital for purposes of satisfying minimum capital requirements constitute a repudiation and breach of plaintiffs' contract rights, as described above, for which plaintiffs are entitled to restitutionary relief.

COUNT IV

92. Plaintiffs incorporate paragraphs 1 through 90.

93. The provisions of the OTS capital regulation restricting the inclusion of the $21 million capital credit and the $5 million face amount of the Subordinated Debenture in Statesman Bank's regulatory tangible capital constitute a repudiation and breach of FSLIC's and FHLBB's obligations under their contracts with plaintiffs, as described above.

COUNT V

94. Plaintiffs incorporate paragraphs 1 through 92.

95. The abrogation of the defendants' contractual agreements by FIRREA and the OTS capital regulation frustrates the entire purpose of plaintiffs' contract with FHLBB and FSLIC for the acquisition of the four thrifts, and deprives plaintiffs of the consideration for which they bargained. Plaintiffs are entitled to rescission of the transaction with defendants, and the return of plaintiffs' investment of $21

million, plus compensation for all monies expended and costs incurred by plaintiffs, and for all benefits conferred upon defendants, through plaintiffs' purchase, operation, and management of the four institutions.

COUNT VI

96. Plaintiffs incorporate paragraphs 1 through 94.

97. Defendants are estopped from asserting or enforcing against plaintiffs the provisions of FIRREA and the OTS capital regulation restricting the inclusion of the supervisory goodwill, the $21 million capital credit and the $5 million face amount of the Subordinated Debenture in Statesman Bank's capital for purposes of satisfying regulatory capital requirements.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray:

(a) That the Court declare that the provisions of FIRREA and the OTS capital regulation restricting the inclusion of supervisory goodwill, the $21 million capital credit and the $5 million face amount of the Subordinated Debenture in capital for purposes of satisfying Statesman Bank's regulatory capital requirements constitute a repudiation and abrogation of plaintiffs' valid contract rights and effect a taking of plaintiffs' property without just compensation and a deprivation of plaintiffs' property without due process of law, in violation of the Fifth Amendment to the United States Constitution;

(b) That the Court order that the transaction be rescinded and award plaintiffs monetary relief in the

amount of their investment, plus compensation for all monies expended and costs incurred by plaintiffs, and for the value of all benefits conferred on defendants, through plaintiffs' purchase, operation and management of the four thrifts, a total sum in excess of $30 million;

(c) That the Court grant plaintiffs their costs, interest, and attorney's fees as allowed by law; and

(d) That the Court grant such other and further relief as the law and evidence may justify and as the Court may deem just and proper.

Respectfully submitted,

/s/ Charles J. Cooper
Charles J. Cooper
Shaw, Pittman, Potts &
Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037

Of Counsel
Michael A. Carvin
Robert J. Cynkar
Peter J. Ferrara

Attorney of Record for
Plaintiffs
STATESMAN SAVINGS
HOLDING CORP.,
THE STATESMAN GROUP,
INC. and AMERICAN LIFE
AND CASUALTY INSURANCE
COMPANY

FEDERAL HOME LOAN BANK BOARD
OFFICE OF EXAMINATIONS AND
SUPERVISION

MEMORANDUM

SP-37a
March 7, 1986

TO: Principal Supervisory Agents

FROM: Francis M. Passarealli

Requests for
Forbearances and
Exceptions to
Filing Require-
ments Regarding
Supervisory
Institutions

Editor's Note: This memorandum constitutes a revision of SP-37 made in order to accommodate amendments to the net worth regulation and to make the language contained herein consistent with the direct investment regulation and R Memorandum 34 ("Level Yield Method of Amortization"). SP-37 is hereby rendered obsolete and is rescinded.

The purpose of the instructions in the attached material is to expedite the processing of supervisory or assisted mergers and acquisitions and to diminish the inordinate amount of staff time presently necessitated to negotiate the terms of forbearance letters with potential acquirers of institutions. Washington

Staff will use these guidelines and the standard forbearance language contained herein. In the interest of consistency and fairness, Supervisory Agents should also use these guidelines where they have a general authorization or delegation to grant forbearance. Potential acquirers should be encouraged to limit forbearance requests to the standardized statements provided in Section I of the memo. They should be advised that requests for forbearances beyond these outlined in Section I will, at a minimum, substantially increase the processing time. Requests for forbearances outlined in Section II will likely be rejected unless they are shown to be key factors in helping to solve exceptionally difficult supervisory cases. Forbearances outlined in Section III will not be granted.

The memorandum is grouped into self-explanatory subjects. The first three deal with forbearances in connection with supervisory mergers, including mergers into a subsidiary of a holding company, and acquisitions of a problem institution either by a holding company or individual(s) without a merger. They are:

I. Stanard forbearances that *will be* granted.
II. Forbearance that *may be* granted on a case-by-case basis if circumstances so justify.
III. Forbearances that *will not be* granted.

The last two subjects cover miscellaneous requirements. They are:

IV. Requests to provide reduced information.
V. Required concluding paragraphs to all forbearance letters.

It should be especially stressed that requests for forbearances, beyond those outlined in Section I, must

be convincingly justified. Blanket requests for forbearances (i.e., all available forbearances) are not acceptable. The basic purpose in granting forbearances is to give realistic incentives to potential acquires of problem institutions. The incentives, however, must be limited to those actually necessary for an acquirer to complete a supervisory merger or acquisition.

This SP memorandum does not cover forbearances appropriate for acquisition of a problem institution by a holding company that is an insured institution.

Francis M. Passarelli
Acting Director

Attachment

cc: Professional Staff—Examinations and Supervision
Office of the FSLIC
Office of the General Counsel

I. Standard forbearances that *will be* granted in connection with supervisory mergers, including mergers with a subsidiary of a holding company, and acquisitions of a problem institution by a holding company or individual(s) without a merger:

Net Worth Requirements
Supervisory Mergers

A-1. Section 563.13 (Regulatory Net Worth Requirement) of the Rules and Regulations for Insurance of Accounts provides in subsection (b)(3)(iii) for the possible exclusion or moderation of the base, amortization, contingency and growth factors of (disappearing institution) by (resulting institution) in computing the net worth requirements of this section provided the merger was instituted for supervisory reasons. Therefore, the Federal Savings and Loan Insurance Corporation will forbear, for a period not to exceed (five) years following consummation of the merger, from exercising its authority, under Section 563.13 of the Rules and Regulations for Insurance of Accounts, for any failure of (resulting institution), to meet the net worth requirements of Section 563.13 arising solely from (1)(a) any increase in the contingency factor attributable to the assets of (disappearing institution(s)) existing at the Effective Date(s), and, (b) any increase in the net growth of (resulting institution) as of the Effective Date(s) by reason of (resulting institution's) assumption of (disappearing institution(s)) liabilities; *or* (2) (resulting institution's) assumption of the net worth deficiency(ies) of disappearing institution(s) as of the Effective Date(s).

Acquisitions by a Holding Company or Individual(s)

A-2. Section 563.13 (Regulatory Net Worth Requirement) of the Rules and Regulations for Insurance of Accounts provides no exceptions in the case of acquisitions which permit the exclusion of scheduled items of an institution in computing the net worth requirements of this section. However, in view of the fact that the acquisition was instituted for supervisory reasons, the Federal Savings and Loan Insurance Corporation will forbear, for a period not to exceed (five) years following consummation of the acquisition, from exercising its authority under Section 563.13 of the Rules and Regulations for Insurance of Accounts, for any failure of (acquired institution) to meet the net worth requirements of Section 563.13 arising solely from an increase in the contingency factor attributable to (acquired institution) at the date of acquisition.

Exclusion of Scheduled Items
Supervisory Mergers

B. The assets acquired by (resulting institution) from (disappearing institution(s)) will be deemed to have been acquired in a merger instituted for supervisory reasons. Therefore, pursuant to any section of the regulations administered by the Federal Home Loan Bank Board where scheduled items are referred to as "assets acquired in a merger instituted for supervisory reason", scheduled items attributable to (disappearing institution(s)) shall be excluded from the computation of scheduled

items in determining whether (resulting institution) meets the requirements of such sections following the effective merger date(s).

II. Forbearances that may be granted in connection with supervisory mergers, including mergers into a subsidiary of a holding company, and acquisitions of a problem institution, either by a holding company or individual(s), without a merger, if circumstances so justify:

Regulations Which Reference Reserve and Net Worth Requirements
Supervisory Mergers

A. For a period of five years following the Effective Date(s), the Board will waive or forbear from enforcement of the reserve or net worth requirements as stated in Insurance Regulation 563.13 provided that the Board may lawfully waive or forbear with respect to such requirements, and provided further that failure to meet the requirements is due to (1)(a) operating losses on acquired assets; (b) capital losses sustained by (resulting institution) upon disposition of acquired assets; (c) acquired assets that are or become scheduled items; and (d) the assumption of (disappearing institution's) liabilities, including averaged liabilities; or (2) (resulting institution's) assumption of (disappearing institution(s')) net worth deficiency(ies) as of the Effective Date(s).

This forbearance generally will be granted where a request demonstrates that without such a forbearance, the resulting institution in a

supervisory merger would be unable to meet, or only marginally meet, the scheduled items and net worth limitations and requirements of the Board's Regulations.

Liquidity Deficiencies
Supervisory Mergers

B-1. For a period of one year following the Effective Date(s), in determining whether a penalty shall be assessed against or paid by (resulting institution) pursuant to Section 523.12 (Deficiencies and Penalties) of the Rules and Regulations for the Federal Home Loan Bank System ("Bank Regulations"), the liquidity requirements of Section 523.11 (Liquidity Requirements) of the Bank Regulations as applied to (resulting institution) shall be reduced by (1) the amount of (disappearing institution(s') liquidity deficiencies existing at the Effective Date(s) and (2) any aggregate net withdrawals (excess of withdrawals over cash savings received) from (disappearing institution(s')) offices after the Effective Date(s).

Acquisitions by a Holding Company or Individual(s)

B-2. For a period of one year following the Effective Date, in determining whether a penalty shall be assessed against or paid by (institution) pursuant to Section 523.12 (Deficiencies and Penalties) of the Rules and Regulations for the Federal Home Loan Bank System ("Bank Regulations"), the liquidity requirements of Section 523.11 (Liquidity Requirements) of the Bank Regulations

as applied to (institution) shall be reduced by (1) the amount of (acquired institution's) liquidity deficiencies existing at the Effective Date and (2) any aggregate net withdrawals (excess of withdrawal over cash savings received) from (acquired institution's) offices after the Effective Date.

References to disappearing institution(s) in items C-D below, include state-chartered associations not previously subject to Federal law, or Federally chartered institutions previously in violtion of Federal law.

Limitation on Service Corporation Investment

C. In determining (resulting institution's) compliance with Section 545.74 (Investments in Service Corporations) of the Federal Regulations, the value of any service corporation acquired by (resulting institution) or by a subsidiary of (resulting institution) in connection with the merger shall not, for a period of five years following the Effective Date, be deemed to be an investment by (resulting institution) in that subsidiary.

This forbearance generally will be granted where a request demonstrates that without such a forbearance the resulting association, in a supervisory merger, would be unable to meet, or only marginally meet, the investment in service corporation limitations of FR 545.74. This waiver will be confined to situations where the disappearing institution(s) had investments in service corporations in excess of that authorized for Federal institutions.

Phase-out of Operations Inconsistent with HOLA

C. (Resulting institution) shall be given a reasonable period of time, but not to exceed ( ) (months/years), to phase out, dispose of or discontinue in an orderly manner, any acquired investments, activities, or operations inconsistent with the Home Owners' Loan Act of 1933 as amended (HOLA), provided that such action is taken at the earliest possible date without material loss to (resulting institution).

This forbearance generally will be granted where a request from an acquiring Federal association demonstrates that the disappearing association(s) in a supervisory merger had investments and/or engaged in activities which are not authorized by the HOLA.

Unauthorized Service Corporation Activities

D. (Resulting institution) shall not for a period not to exceed ( ) years, be deemed in violation of any of the provisions of Section 545.74 (Service Corporations) of the Rules and Regulations for the Federal Savings and Loan System by reason that any activities of a service corporation acquired as part of the merger(s), at or before the effective date(s), are not approved or authorized by the Home Owners' Loan Act of 1933, as amended.

This forbearance geneally will be granted where a request from an acquiring Federal association demonstrates that the disappearing association(s) in a supervisory merger had a service corporation or subsidiary which engaged in activities not authorized by FR 545.74 or by the HOLA.

Building Investment

E. For a period of five years after the Effective Date(s), for purposes of calculating (resulting institution's) building investment under Section 545.77 (Real Estate for Office and Related Facilities) of the Federal Regulations, all building investments in (disappearing institution(s)) may be excluded.

This forbearance generally will be granted where a request from an acquiring Federal association demonstrates that without such a forbearance, the resulting Federal association would be unable to meet, or only marginally meet, the investment limitations contained in FR 545.77.

Holding Company Net Worth Requirements
Supervisory Mergers

F-1. For the purpose of calculating any holding company net worth maintenance requirements of (Holding Company) for (resulting institution), the Board will exclude, for a period of five years, the asset and liability balances of (disappearing institution(s)).

This forbearance is applicable to cases where a holding company has a net worth maintenance requirement for a subsidiary institution which is merging with a supervisory case. This forebearance will be confined to supervisory mergers where the acquired association is a very serious supervisory problem.

Acquisitions by a Holding Company or Individual(s)

F-2. There is no standard forbearance language exempting acquiring holding companies or individuals from maintaining net worth. This is because

it is OES policy to mandate that new acquirers satisfy the regulatory net worth requirement with respect to insured subsidiaries. Only in the most unusual circumstanes will any modification of this requirement be considered.

Divided Limitations

Supervisory Mergers and Acquisitions by a Holding Company or Individual(s)

G. The Board may eliminate the 50% of net income dividend limitation for (resulting or acquired institution) which is controlled by (holding company). The limitation may be waived only where dividends are going to service holding company debt.

This forbearance will rarely be granted, and when granted, will be confined to supervisory mergers or acquisitions where the acquired institution is a very serious supervisory problem. Any request for elimination of the 50% of net income dividend limitation must be supported by convincing evidence that the acquiring holding company is strongly capitalized and will agree to maintain the net worth of the subsidiary insured institution at the required regulatory level as stated in Section 563.13.

(It should be noted that eligible dividends are calculated based on net income from the time that the holding company acquired stock of an institution. "Acquired" means the date of the consummation of the purchase of the association's stock by the holding company. Preacquisition earnings may not be distributed.)

Preapproval of Debts

H. The Board will allow for preapproval of debt in accordance with Section 408(g) (Holding Company Indebtedness) of the National Housing Act and Section 584.6 (Holding Company Indebtedness) of the Holding Company Regulations. This approval will be included in the Resolution approving the acquisition of the supervisory institution. The language of the Resolution with respect to the preapprcval of debt is as follows:

Resolved, that the Bank Board, pursuant to § 408(g) of the NHA, 12 U.S.C. § 1730a(g) (1976) and § 584.6 of the Holding Company Regulations (12 C.F.R. § 584.6) hereby approves (Acquiring Company(ies) and its (their)) subsidiaries that are not insured institutions under § 408(a)(1)(a) of the National Housing Act to incur future indebtedness without further application to the FSLIC, provided that:

(1) (Acquiring Company(ies) shall stipulate, in a form satisfactory to the supervising agent, that (a) no later than forty-five calendar days prior to the close of its fiscal year, (acquiring Company(ies)) shall submit to the supervisory agent, with copies to the Office of Examinations and Supervision, an annual debt budget for the following fiscal year for (Acquiring Company(ies) and its (their)) subsidiaries that are not insured institutions under § 408 (a)(1)(a) of the National Housing Act, prepared both on a consolidated (excluding any insured subsidiary) and unconsolidated basis and in a form satisfactory to the supervisory agent; and (b) (Acquiring Company(ies) and its (their)) subsidiaries that are not insured institutions under

§ 408(a)(1)(a) of the National Housing Act will comply with all covenants in their debt instruments and agreements, and any default with regard to such convenants will be promptly cured within thirty days or will be reported to the supervisory agent; and

(2) The supervisory agent may, within ten calendar days of receipt of the annual debt budget, request additional information for (Acquiring Company(ies)). The annual debt budget shall be deemed complete when all additional information requested by the supervisory agent has been received, or, if no additional information is requested, on the date the annual debt budget is received. If the supervisory agent does not object in writing to the annual debt budget, or to any additional information submitted in connection therewith, within thirty calendar days following the date on which the annual debt budget is complete, the annual debt budget shall be deemed approved and (Acquiring Company(ies) and its (their)) subsidiaries that are not insured institutions under § 408(a)(1)(a) of the National Housing Act shall have the right to issue, sell, renew, guarantee, or assume debt as set forth in the annual debt budget without any further filing or application with respect thereto; and

(3) (Acquiring Company(ies)) shall, prior to the issuance, sale, renewal, guarante or assumption of debt in excess of the amounts set forth in the annual debt budget, file an application, in a form satisfactory to the supervisory agent, with copies to the Office of Examinations and Supervision, for authority to exceed their annual debt budgets. If the supervisory agent does not object in writing

within thirty calendar days following the date the application is complete, which date shall be determined in the same manner as set forth in the immediately preceding paragraph, the application shall be deemed approved; and

(4) The FSLIC may terminate the approval given pursuant to § 408(g) of the NHA and § 584.6 of the Holding Company Regulations, or may amend the terms of such approval as set forth in this Resolution, for good and reasonable cause after providing (Acquiring Company(ies)) with notice and an opportunity for response.

The request generally will be granted where the holding company is a financially strong regulated financial institution. Other types of holding companies will be considered for preapproval of debt on a case basis.

Accounting
Supervisory Mergers

I-1. In connection with supervisory mergers, the resulting institution may request forbearances identified below as SM-1, SM-2, SM-3 or any combination of these forbearances or, as an alternative, request forbearance SM-4. Selection of alternative SM-4 requires the inclusions of SM-6 in the forbearance letter. If forbearances SM-1, SM-2 and/or SM-3 are granted, item SM-5 will also be included in the forbearance letter. The request for forbearances SM-1, SM-2 and/or SM-3 will determine which of the subsections of SM-5 are included. The overall matching is as follows:

Forbearrance No.	*Subsection of Forbearance SM-5 or SM-6*
SM-1	(a)
SM-2	(b)
SM-3	(c)
SM-4	SM-6

An example of the application of the above would be where a request is made for forbearances SM-1 and SM-3. In this case, subsections (a) and (c) would be added to the basic paragraph continued in SM-5.

SM-1. It is the Corporation's intention that the cash contribution to be made to (resulting institution) pursuant to an assistance agreement to be entered into between the FSLIC and (resulting institution) is to be a credit to (resulting institution's) regulatory net worth; therefore, for regulatory accounting purposes, (resulting institution) may book such contribution as a direct addition to its net worth.

This forbearance generally will be granted upon the request of the resulting institution in a supervisory merger.

SM-2. For purposes of reporting to the Board, the value of any unidentifiable intangible assets resulting from accounting for the merger in accordance with the purchase method may be amortized by (resulting institution) over a period not to exceed ( ) years by the straight line method.

This forbearrance generally will be granted upon the request of the resulting institution in a supervisory merger.

SM-3. For purposes of reporting to the Board, any discount, arising from the adjustment of (disappearing institution's) mortgage portfolio to its fair value, shall be amortized to income by the level yield method assuming contractually required payments will be received for ( ) years, and the remaining balance will be repaid at the end of the ( )th year or by the level yield method over the average remaining live of the acquired portfolio, with the discount adjusted annually t reflect the actual prepayment experience of the portfolio.

This forbearance generally will be granted upon the request of the resulting institution in a supervisory merger.

SM-4. For purposes of reporting to the Board, (resulting institution's) board of directors shall, by appropriate resolution adopted within ( ) days following the effective date(s) of the merger with (disappearing institution), elect to account for the merger, in accordance with the purchase method of

accounting under generally accepted accounting principles (GAAP), or, alternatively, to apply the purchase method, except that any FSLIC assistance received in connection with the merger may be credited directly to regulatory net worth and the value assigned to any unidentifiable intangible assets shall be amortized by the straight line method over a period not to exceed ( ) years.

This forbearance generally will be granted upon the request of the resulting institution in a supervisory merger when the accounting for the merger has not been addressed in the negotiations.

SM-5. Not later than ( ) days following the effective date(s) of the merger, (resulting institution) shall submit to the Supervisory Agent an independent certified public accountant's opinion that (resulting institution) has accounted for the merger in accordance with generally accepted accounting principles except that as herein provided by the Board, for purposes of reporting to the Board: (a) the cash contribution by the FSLIC to (rsulting institution) with respect to (disappearing institution(s)) pursuant to the Assistance Agreement shall be deemed a contribution to regulatory net worth, and may be booked as a direct credit to (resulting institution), (b) the value of any unidentifiable intangible assets resulting from their merger may be amortized by (resulting institution) over a period not to exceed ( ) years by the straight line method, and (c) any discount arising from adjusting the mortgage loan portfolio to its face value shall be amortized to income by the level yield method assuming contractual monthly payments for a ( ) year period and repayment of the remaining balance at the end of the ( ) year or by the level yield method over the average remaining live of the acquired portfolio, with the discount adjusted annualy to reflect the actual prepayment experience of the portfolio.

SM-6. Not later than ( ) days following the Effective Date(s) of the merger, (resulting institution) shall submit to the Supervisory Agent an independent certified public accountant's opinion that (resulting institution) has accounted for the merger in accordance with generally accepted accounting principles ("GAAP") except that as herein provided by the Board, and pursuant to an election by (resulting institution's) board of directors, for purposes of reporting to the Board: (a) the cash contribution by the FSLIC to (resulting institution) with respect to (disappearing institution(s)) pursuant to the Assistance Agreement shall be deemed a contribution to regulatory net worth and may be booked as a direct credit to (resulting institution), (b) the value of any unidentifiable intangible assets resulting from their merger may be amortized by (resulting institution) over a period not to exceed ( ) years by the straight line method, and (c) any discount arising from adjusting the mortgage loan portfolio to its face value shall be amortized to income by the level yield method assuming contractual monthly payments for a ( ) year period and repayment of the remaining balance at the

end of the ( )th year or by the level yield method over the average remaining live of the acquired portfolio, with the discount adjusted annually to reflect the actual prepayment experience of the portfolio.

Acquisitions by a Holding Company or Individual(s)

I-2 In connection with acquisitions by a holding company or individual(s), or any other entity, the use of push-down accounting will be permitted to the extent authorized by GES Memorandum R-55, dated January 17, 1983, or as may be subsequently amended. As stated in R-55, appropriate evidence must be supplied by an independent public accountant that both the establishment of a new basis of accounting at the time of the acquisition and the current use of push-down accounting are in conformity with GAAP.

Where push-down accounting in authorized, the institution may request forbearances identified below as HC/I-1, HC/I-2, HC/I-3 and HC/I-4, or any combination of these forbearances. Forbearance HC/I-1 serves as a prerequisite to the granting of forbearances HC/I-2, HC/I-3, and HC/I-4, and, therefore, of necessity, must be part of any request for accounting forbearances.

The selection of any of these forbearances requires the addition of a subsection from HC/I-5. The matching is as follows:

Forbearance No.	*Subsection of Forbearance HC/I-5*
HC/I-1	(a)
HC/I-2	(b)
HC/I-3	(c)
HC/I-4	(d)

An example of the application of the above would be where a request is made for forbearances HC/I-1 and HC/I-3. In this case, subsections (a) and (c) would be added to the basic paragraph continued in HC/I-5.

HC/I-1. For the purposes of reporting to the Board, with respect to the books and records of (institution), push-down accounting shall be used to record the purchase of (institution's) capital stock.

HC/I-2. It is the Corporation's intention that the cash contribution to be made to (institution) pursuant to an Assistance Agreement to be entered into between the FSLIC and (institution) is to be a credit to (institution's) regulatory net worth; therefore, for regulatory accounting purposes, (institution) may book such contributions as a direct addition to its net worth.

HC/I-3. For purposes of reporting to the Board, the value of any intangible asset resulting from the application of push-down accounting in accounting for the purchase, may be amortized by (institution) over a period not to exceed ( ) years by the straight line method.

HC/I-4. For purposes of reporting to the Board, any discount arising from the adjustment of the mortgage loan portfolio of (institution) to its fair value shall be amortized to income by the level yield method assuming contractually required payments will be received for ( ) years; and the remaining balance will be repaid at the end of the ( )th year or by the level yield method over the average remaining live of the acquired portfolio, with the discount adjusted annually to reflect the actual prepayment experiences of the portfolio.

HC/I-5. Not later than ( ) days following the Effective Date(s) of the acquisition, (institution) shall submit to the Supervisory Agent an opinion of independent certified public accountants that (institution) has accounted for the transaction in accordance with generally accepted accounting principles ("GAAP") except that as herein provided by the Board, for purposes of reporting to the Board: (a) "push-down" accounting shall be used to reflect the acquisition on (institution's) books; (b) the cash contribution by the FSLIC to (institution) pursuant to the Assistance Agreement shall be deemed a contribution to regulatory net worth, and may be booked as a direct credit to (institution); (c) the value of any resulting unidentifiable intangible asset may be amortized by (institution) over a period of ( ) years by the straight line method; and (d) any discount arising from adjusting the mortgage loan portfolio to its face value shall be amortized to income by the level yield method assuming contractual monthly

payments for a ( ) year period and repayment of the remaining balance at the end of the ( )th year or by the level yield method over the average remaining life of the acquired portfolio, with the discount adjusted annually to reflect the actual prepayment experience of the portfolio.

III. Forbearances that *will not be* granted in connection with supervisory mergers or acquisitons by a holding company or individual(s):

Transactions with Affiliates

A. Preapproval of transactions with affiliates under Section 408(d) (Prohibited Transactions) of the National Housing Act and Section 584.3 (Transactions with Affiliates) of the Holding Company Regulations.

Interlocks

B. Requests for FHLBB guaranteed preapproval of any interlocks covered by Part 563f (Management Official Interlocks) of the Insurance Regulations.

[PAGE MISSING FROM ORIGINAL AND UNATTAINABLE]

paragraphs ____ through ____. Other than the actions to enforce the regulatory requirements waived in accordance with paragraphs ____ through ____ and the statutory provisions authorizing imposition of the waived requirements, insofar as such requirements are waived, the Board and the Federal Servings and Loan Insurance Corporation expressly reserve all of their statutory rights and powers with respect to (institution) including, without limitation, those under Section

5 of the Home Owners' Loan Act of 1933 and Sections 406 and 407 of the National Housing Act.

OTHER ASSETS (Cont'd)

Deferred Net Losses (Gains) on: – Lines A520 and A530

If gains exceed losses (resulting in a net credit), enclose the net amount in brackets [ ].

Line A520 – Loans Sold

Record the net of all deferred losses and gains on the sale of loans as required by Regulation 563c.14.

Line A530 – Other Assets Sold

Record on this line the net of all deferred losses and gains on the sale of other assets as defined by Regulation 563c.14. This includes such items as: (1) redeemable ground rent leases; (2) mortgage-related securities; (3) preferred stock that at the time of issuance provides for redemption on a fixed date in a fixed dollar amount or for redemption pursuant to a fixed schedule of periodic payments and has a remaining term to maturity of at least five years; and (4) debt securities that do not qualify as liquid assets under Regulation 523.10(g) because of their maturities or that have remaining terms to maturity of at least five years. *Do not report* deferred profits on sale of real estate that should be reported on Line A580 (Other Assets).

Intangible Assets:- Lines A542 and A544

Line A542 – Purchased Loan Servicing

Report on this line the unamortized cost of purchased loan servicing rights. The amortization

of purchased loan servicing rights is deducted from Line D090 (Loan Servicing Fees).

Line A544 – Goodwill and Other

Report on this line the total amount of unamortized goodwill and intangibles other than purchased loan servicing reportable on Line A542. Include goodwill and other identified intangibles that originated from the application of purchase or pushdown accounting. For pushdown accounting, see Bank Board memorandum R-55a. The amortization of goodwill and other intangibles is reported on Line E110 (Amortization of Goodwill). One-time writeoffs of goodwill are reported on E310 (Other Nonoperating Expense).

REGULATORY CAPITAL EXCLUDING GENERAL LOAN-LOSS RESERVES – Lines C012 thru C115

General Loan-Loss Reserves are discussed in the instructions for Line C115 (Retained Earnings).

Preferred Stock: – Lines C012 and C014

Include on the appropriate line, stock issued by the institution that is guaranteed priority over common stock in liquidation and in the payment of dividends by the institution's corporate charter and that qualifies as regulatory capital as defined in Regulations 561.13 and 563.7-5. Exclude nonqualifying preferred stock and preferred stock issued by a finance subsidiary, reportable on Line B100 (Other Borrowings).

Line C012 – Perpetual

Report here preferred stock that has no stated maturity and cannot be redeemed except at the option of the issuer. Perpetual preferred stock also includes preferred stock that is convertible into common stock.

Line C014 – Other Qualifying

Report on this line qualified nonpermanent preferred stock (e.g., preferred stock that has a stated maturity, a required redemption provision, or a redemption that is at the option of the holder).

Line C020 –Permanent, Reserve, or Guaranty Stock

Enter the par value of all *outstanding* permanent, reserve, or guaranty stock issued by the institution. Contributed capital in excess of par value net of the cost of issuing stock is to be reported on Line C030 (Contributed Capital). The par value of treasury stock (stock reacquired by the institution) must be deducted from this line to obtain the outstanding stock of the institution (that amount issued to others).

Line C030 – Contributed Capital

Report paid-in capital in excess of par value net of the cost of issuing stock. Generally, paid-in capital arises from the sale of capital stock for an amount in excess of par value. Deduct from this line the amount paid for stock reacquired by the institution (treasury stock) in excess of its par value. Also includable on this line are (1) capital contributions by the stockholders and/or holding company not related to the purchase of stock; and

(2) permanent capital contributions by the FSLIC not in the form of the capital instruments reportable on Lines C070 thru C090.

Line C040 – Qualifying Mutual Capital Certificates

Report on this line all outstanding mutual capital certificates that quality as equity capital. Non-qualified mutual capital certificates must be included on Line B180 (Other Liabilities). Refer to Regulation 563.7-4.

Line C050 – Qualifying Subordinated Debentures

Enter debt claims represented by subordinated debentures issued by the institution that qualify for inclusion in regulatory capital in accordance with Regulation 561.13. Accrued interest payable is reportable on Line B110 (Accrued Interest Payable). Interest expense on subordinated debentures is reportable on Line E190 (INTEREST CHARGES ON: Subordinated Debentures).

Lined C060 – Appraised Equity Capital

Report on this line the excess of appraised value over (1) net book value of office land, buildings and improvements, and eligible leasehold improvements, owned by the insured institution or any of its subsidiaries; and (2) the deferred profit from a sale with leaseback of formerly owned office properties. The amount entered on this line must equal the sum of Lines A430 and A500 (Appraisal Increment). The appraised value is equal to the "one time only" appraisal permitted by the Principal Supervisory Agent as provided for in Regulation 563.13(c). The portion of appraised equity capital attributable to unamortized deferred profit includes only that allowable

under Regulation 563.13(c) and must be adjusted to reflect the current level of unamortized deferred profits. The amount reported on this line must be reduced for sales, other dispositions, and the aforementioned amortization of deferred profits.

Line C070 – Net Worth Certificates

Include on this line Net Worth Certificates (NWCs) issued to the FSLIC.

FEDERAL HOME LOAN BANK BOARD

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

PROPOSAL FOR THE ACQUISITION OF

FIRST FEDERATED SAVINGS BANK, WEST PALM BEACH, FLORIDA
FIRST FEDERAL SAVINGS BANK, WATERLOO, IOWA
PEOPLES FEDERAL SAVINGS AND LOAN ASSOCIATION, WATERLOO, IOWA
THE PERPETUAL SAVINGS AND LOAN ASSOCIATION, WATERLOO, IOWA

January 1988

Submitted by the Management
of
The Statesman Group, Inc.
1400 Des Moines Building
Des Moines, Iowa 50309
(515) 284-7500

With the assistance of:

Ferguson & Company
600 E. Las Colinas Boulevard
Suite 1700
Irving, Texas 75039
(214) 869-1177

ACQUISITION PROPOSAL

TABLE OF CONTENTS

		Page
I.	Introductory Statement	[1]
II.	Description of The Statesman Group, Inc.	[1]
III.	Description of Acquiring Entity	[1]
IV.	Bid Proposal	[3]
	1. Subsidiaries of Association	[3]
	2. Capital Infusion by Acquirers	[3]
	3. Additional Contribution by Statesman	[3]
	4. FSLIC Assistance Required	[4]
	5. Regulatory Considerations and Forbearances	[5]
	6. Exclusion of Certain Leases	[16]
	7. Maintenance of Deposits	[17]
V.	Business Plan	[17]
VI.	Management and Directorate of Acquirer	[17]
VII.	Authority of Acquirers	[18]
VIII.	Accountants' Statement	[18]
IX.	Tax Considerations and Benefits	[18]
X.	Other Considerations	[19]

	Appendix
The Statesman Group, Inc. Organizational Chart	A
The Statesman Group, Inc. Officers and Directors	B
American Life and Casualty Insurance Company Officers and Directors	C

Authorization of Acquirer – Letter of Counsel	D
Accountants' Statement	E

ACQUISITION PROPOSAL

I. *Introductory Statement*

The Statesman Group, Inc., ("Statesman") headquartered in Des Moines, Iowa, proposes to acquire substantially all of the assets and liabilities of First Federated Savings Bank, West Palm Beach, Florida; First Federal Savings Bank, Waterloo, Iowa; Peoples Federal Savings and Loan Association, Waterloo, Iowa, and The Perpetual Savings and Loan Association, Waterloo, Iowa, (collectively the "Associations") through a supervisory acquisition assisted by the Federal Savings and Loan Insurance Corporation ("FSLIC").

II. *Description of The Statesman Group, Inc.*

Statesman is a financial services holding company which, through its subsidiaries, engages primarily in the business of life insurance and, to a lesser extent, in the businesses of investment banking and retail brokerage and property-casualty insurance. In addition, in January, 1987, Statesman, through a 60%-owned subsidiary, Statesman Mortgage Holding Company, purchased all of the outstanding stock of a mortgage company, Statesman Mortgage Company. An organizational chart describing Statesman's subsidiary and affiliated companies is attached as Appendix A. Statesman was incorporated in 1959 and its common stock is traded on a national over-the-counter market.

III. *Description of Acquiring Entity*

Statesman intends to establish and incorporate a unitary savings and loan holding company which, for

purpose of identification, shall be referred to herein as "Statesman Savings Holding Corp." or "SSHC." The initial capital infusion into SSHC shall be $21,000,000, of which 60% ($12,600,000) shall be represented by preferred stock issued by Statesman to SSHC in exchange for preferred stock issued by SSHC to Statesman. The other 40% ($8,400,000) shall be in the form of cash contributed by American Life and Casualty Insurance Company ("American Life"), a wholly-owned Statesman subsidiary, in exchange for voting common stock issued by SSHC to American Life. As a result, American Life will have voting control of SSHC.

SSHC will in turn establish and incorporate a wholly-owned subsidiary federal savings bank, and for purposes of references herein shall be identified as "Statesman Bank for Savings, FSB" or "SBS." SSHC will contribute all of the Statesman preferred stock and all of the cash acquired from American Life to SBS in exchange for SBS common stock, thereby capitalizing SBS in the amount of $21,000,000. Thus SBS would be the acquiring corporate entity of the assets and liabilities of the four associations which are the subject of the bid proposal. However, references in this bid proposal and the Business Plan may refer to Statesman as the acquirer, it being understood that Statesman is submitting this bid and intends that the acquisition occur in the manner set forth herein. It is further understood that FSLIC shall deliver said assets and liabilities on a "turnkey" basis, with FSLIC providing for the combining of the assets and liabilities of the Associations prior to the acquisition, establishment and incorporation of SSHC and SBS, transfer of assets and liabilities to SBS, and recording and filing all documents in accordance with various state and federal requirements, all at the cost of FSLIC.

IV. *Bid Proposal*

Statesman proposes to purchase the four associations identified herein under the following terms and conditions:

1. *Subsidiaries of Associations.* All subsidiary corporations of the four Associations and their assets, including mortgage servicing rights, shall be included as assets included in this transaction. The stock of such subsidiaries (or the assets and remaining liabilities in the event of dissolution prior to acquisition) shall be transferred to SBS. FSLIC will cause and ensure the transfer of all such mortgage servicing rights to SBS or a subsidiary of Statesman which is duly qualified to service such mortgages. It is a condition of this proposal that there be no material change (more than 15%) in the total dollar volume of the mortgage servicing portfolio between September 30, 1987 and the date of acquisition.

2. *Capital Infusion by Acquirer.* In the manner described in Section III above, Statesman will cause SBS to have a capital infusion of $21,000,000, consisting of 40% ($8,400,000) cash and 60% ($12,600,000) Statesman preferred stock.

3. *Additional Contribution by Statesman.* As additional consideration for the acquisition of the Associations, SBS agrees to assume losses arising from disposition and/or maintaining assets other than Covered Assets, as defined below, acquired in the transaction, which are estimated to be approximately $26,000,000.

4. *FSLIC Assistance Required.* FSLIC assistance is required in this transaction. The forms of assistance sought and required are as follows:

a. *Cash and Promissory Note.* FSLIC will contribute cash and a note receivable in an

amount, as of the date of acquisition, which is equal to the combined deficit of the Associations, adjusted for:

(i). Increase: Write-off of goodwill, other intangibles, deferred losses and appraised equity capital;

(ii) Decrease: All valuation allowances (excluding allowances for one to four-family dwelling units, owned or mortgaged) adjusted for uncollectable accrued interest receivable; and

(iii) Increase: Equity in the adjusted losses of Federated Financial Corporation, the wholly-owned mortgage banking subsidiary of First Federated Savings Bank.

Thirty percent (30%) of this contribution shall be payable to SBS in the form of cash within five (5) days of the date of acquisition. Seventy percent (70%) of this amount shall be payable in the form of a promissory note executed and delivered within five (5) days of the date of acquisition. It is projected that the principal amount of this contribution as at December 31, 1987 will exceed $115,000,000, and will increase between that date and the actual date of acquisition. The FSLIC note shall bear variable interest, adjusted quarterly, at a rate equal to the Eighth District cost of funds plus 200 basis points. The note will be amortized over five years and principal and interest payments shall be paid quarterly and may be prepayable without penalty at FSLIC's option.

b. *Losses on Covered Assets.* FSLIC will pay to SBS quarterly cash payments equal to 93 percent of losses incurred on the disposition of Covered Assets during the prior quarter for a period of five (5) years from the date of

acquisition. Covered Assets are defined as follows:

(i) Real Estate Owned, Real Estate Held for Investment, and Real Estate in Judgment, excluding in all three categories one to four family dwelling units.

(ii) The principal on all mortgage and non-mortgage loans which at the date of acquisition are classified or ninety days or more delinquent and the principal and accrued interest receivable on mortgage and non-mortgage loans which become classified or ninety days or more delinquent within two years of the acquisition, excluding loans secured by first liens or first mortgages on one to four-family dwelling units and direct or participation loans with a total balance of $50,000 or less. (If a loan has an SBS participation under a $50,000 balance but the total balance exceeds $50,000, the loan will be a covered asset provided it is not on a one to four family dwelling unit secured by a SBS first mortgage.)

(iii) Investments in and loans to subsidiaries. Losses shall be the difference between the carrying (book) value of Covered Assets (plus accrued interest if applicable under subparagraph (ii) immediately above) before considering recorded loss allowances, and the net sales proceeds realized by SBS on the disposition of such assets.

c. *Yield Maintenance.* FSLIC will provide cash payments on a quarterly basis for spread and yield maintenance on Covered Assets in an amount equal to the Eight District cost of funds plus 225 basis points.

d. *Indemnifications.* FSLIC will indemnify Statesman, its subsidiaries, affiliates, officers,

directors and employees for a period of five (5) years for and against:

(i) All undisclosed or unrecorded (not booked) liabilities of the Associations, their subsidiaries and affiliates, in their respective September 30, 1987 financial statements;

(ii) All claims not reserved for and subsequently asserted against the Associations, their subsidiaries or affiliates, or Statesman, its subsidiaries, officers and directors, as the Acquirer and successor of the Associations;

(iii) Litigation brought to challenge or set aside the transaction on the basis of any alleged illegal action by the Federal Home Loan Bank Board or FSLIC; and

(iv) Any claims based on ERISA rights and any unfunded employment and/or severance benefit plans, policies, or contracts, other employee benefit contracts, employment contracts, and pension plans, with employees or ex-employees of the Associations or any of their subsidiaries, which exist at, or existed prior to the time of acquisition.

5. *Regulatory Considerations and Forbearances.* As a part of the proposed acquisition, certain regulatory forbearances and considerations will be granted or procured by FSLIC as identified below:

a. For regulatory purposes, with respect to the books and records of SBS, push-down accounting shall be used to record the purchase of SBS's capital stock by SSHC. Twenty one million dollars of the cash contribution to be made to SBS pursuant to an assistance agreement to be entered into between the FSLIC and Statesman is to be a credit to SBS's regulatory

capital; therefore, for regulatory accounting purposes, SBS will book such contribution as a direct addition to its net worth. Accordingly, immediately after the acquisition, the regulatory capital of SBS will be $42,000,000 which will consist of $21,000,000 in capital infused by SSHC, plus $21,000,000 in capital contributed by the FSLIC which will be treated as regulatory capital. Not later than 30 days following the acquisition, SBS shall submit to the Supervisory Agent an opinion of independent certified public accountants that SBS has accounted for the transaction in accordance with generally accepted accounting principles ("GAAP") including the use of "push down" accounting, except that as provided by the Board, for purposes of reporting to the Board, twenty-one million dollars of the cash contribution by the FSLIC to SBS pursuant to the assistance agreement shall be deemed a contribution to regulatory net worth and will be booked as a direct credit to SBS.

b. The FSLIC will permit Statesman and SSHC to enter into a capital maintenance agreement for SBS that is limited to:

(i) an agreement to cause the regulatory capital of SBS to be maintained at a level consistent with that required by 12 C.F.R. 563.13(b) as now or hereinafter in effect, and will infuse sufficient capital, in the same ratio and form as the initial contribution as set forth in Section IV, paragraph 2 above, to effect compliance with such requirement, *provided* that the aggregate amount of the combined obligation of Statesman, SSHC and American Life shall not exceed an amount equal to $4 million.

(ii) an agreement that in the event SBS's ratio of regulatory capital to total liabilities at

the end of any given calendar quarter falls below 2 percent, and Statesman and SSHC are unwilling and/or unable to infuse sufficient additional equity capital to restore SBS's ratio of regulatory capital to total liabilities to 2%, regardless of the amount of equity capital previously infused into SBS pursuant to the aforementioned agreement, the FSLIC will have the right to vote the securities acquired by Statesman and SSHC, remove SBS's board of directors, and/or dispose of any or all of the voting securities of SBS owned by Statesman, American Life or SSHC.

This proposed agreement is intended to satisfy two of Statesman's concerns. First, as a diversified company, Statesman is concerned to ensure that its debt rating is not downgraded as a result of the company becoming subject to an unlimited contingent obligation. Second, as a matter of business judgment, Statesman is equally concerned by the prospect of becoming subject to an unlimited capital guarantee. This proposed capital agreement is based upon the agreements used in certain acquisitions of healthy thrifts by diversified acquirers, such as Ford, Fuqua, and Temple-Inland and is modified to reflect the fact that this is a supervisory transaction.

(c) The FSLIC will give permanent and continuing approval to the issuance of debt by Statesman and its affiliates (or waive the debt requirement under section 408(m) of the National Housing Act), so long as the regulatory capital of SBS meets the amount required at the time the debt is issued. At the time Statesman (with approximately one billion dollars in assets), acquires SBS (with approximately $700 million in assets), it is anticipated that Statesman will

qualify as a diversified savings and loan holding company and will not be subject to the debt limitations of 12 U.S.C. 1730a or 12 C.F.R. 584. However, as demonstrated in the Business Plan, Statesman plans to transform SBS into a profitable and growing institution. The successful operation and growth of SBS could cause Statesman to become a nondiversified institution subject to the debt restrictions. Due to the peculiarities of the insurance industry and the wide diversification of Statesman's financial service activities, Statesman's debt requirements are highly unpredictable and variable, and the standard prior-approval procedure would therefore pose a significant hardship.

A waiver or prior approval for Statesman's debt would not compromise the regulatory objectives of the National Housing Act or the FSLIC. The purpose of the debt limitation is to ensure that savings and loan holding companies do not become over leveraged and seek to drain assets from a subsidiary insured institution. Since as part of this acquisition Statesman will agree to maintain the capital of the acquired institution at certain levels, and Statesman has not requested a forbearance from the standard limitation of dividends to 50% of net earnings, the FSLIC will have no need to rely upon the cumbersome procedures for debt approval in order to protect the capital of SBS. Furthermore, Statesman operates in the highly regulated and conservative insurance industry where regulators impose capital requirements on its subsidiaries. (Statesman's broker-dealer subsidiary is likewise subject to capital requirements). Consequently, there is no regulatory purpose to be served by requiring such prior approval for debt.

d. The FSLIC will authorize the acquisition under section 408(m) of the National Housing Act, 12 U.S.C. 1730a, will determine under such authority that Statesman and its affiliates are exempt from the operation of section 408(p) of the National Housing Act, 12 U.S.C. 1730(p), with respect to the cross-marketing of products or services between SBS and Statesman, its subsidiaries or its affiliates, and will confirm that such sales, as described herein, are consistent with section 408(d) of the National Housing Act.

Statesman is a leading provider of life and property and casualty insurance products and services, and currently markets more annuities and other insurance products and services through savings and loan associations than through any other form of retail outlet. As described in the Business Plan, Statesman would intend to sell such insurance products and services through the facilities of SBS. Under this arrangement, insurance products and services would be sold on the premises and by the employees of SBS, and for these marketing efforts the institution and/or its employees would receive payments from the Statesman insurance affiliates at some contractually determined rate.

Under the arrangement outlined above, marketing services would be provided by SBS and its employees on behalf of Statesman. Such marketing arrangements would not violate the affiliate-transaction provisions of section 408(d) of the National Housing Act, 12 U.S.C. 1730(d), and regulations thereunder, nor violate the affiliated-party regulations found in subchapter D of the Board's regulations because Statesman and its insurance affiliates would provide no services to,

and receive no payments for services to, SBS. Likewise, while Statesman and its subsidiaries would intend to deposit funds in SBS, such deposits cannot violate the prohibitions against maintaining compensating balances because the deposits will be made in, rather than by, SBS. Statesman requests formal confirmation of these conclusions.

In addition, section 408(p) of the National Housing Act, 12 U.S.C. 1730(p), as recently added by the Competitive Equality Banking Act of 1987, generally forbids an insured institution which is a subsidiary of a diversified savings and loan holding company from offering or marketing products or services of an affiliate that are not permissible for bank holding companies to provide under section 4(c)(8) of the Bank Holding Company Act, or from offering or marketing its own such products or services through an affiliate. Under the recently re-enacted section 408(m) of the National Housing Act, 12 U.S.C. 1730a(m), the FSLIC with certain exceptions is permitted to authorize a supervisory acquisition "notwithstanding any provisions of the laws or constitution of any State or any provision of Federal law." The exceptions do not include the cross-marketing prohibitions of section 408(p). Consequently the FSLIC is authorized under section 408(m) to provide relief from the section 408(p) prohibitions.

e. The acquisitions will occur pursuant to FSLIC authorization under section 408(m) of the National Housing Act, 12 U.S.C. 1730a, and the FSLIC will affirmatively find that such authorization pre-empts the laws of any state that would limit or preclude the affiliation of SBS and

Statesman or any of its insurance affiliates or would, by reason of such affiliation, prohibit the sale of insurance by Statesman, its insurance affiliates or agents.

Statesman's principal business is insurance which is provided by companies organized in several jurisdictions and sold by agents located in some 47 states. Various states prohibit the affiliation of insurance companies and depository institutions or prohibit the sale of insurance by agents of companies with such affiliations. The federal pre-emption of such states limits is a necessary prerequisite to Statesman's ability to continue to conduct its insurance business. The FSLIC's authority in this regard under section 408(m) was recently clarified by Congress. *See* H.R. Rep. No. 261, 100th Cong., 1st Sess. 140.

f. The acquisition will occur pursuant to authorization under section 408(m) of the National Housing Act, 12 U.S.C. 1730a, and that the FSLIC will find that the affiliation of SBS and Statesman's broker/dealer subsidiary, R.G. Dickinson & Co. is not prohibited by section 408(r) of the National Housing Act, 12 U.S.C. 1730a(r). In this connection, subsection 408(r)(2)(D) provides an exception from the prohibition for an affiliation that results from an acquisition under section 408(m) of an institution (such as SBS) with total assets of $500 million or more at the time of the acquisition. FSLIC will assure Statesman that it can continue to simultaneously own SBS and R.G. Dickinson & Co.

g. The FSLIC will require that the acquisition of the shares of the newly converted institution, SBS (and therefore the acquisition of the shares of its parent companies, SSHC and Statesman),

be subject to the limitations found in section 563b.3(i)(3) of the FSLIC's conversion regulations, 12 C.F.R. 563b.3(i)(3), for at least 18 months.

The FSLIC's conversion regulations specifically provide that the restriction of section 563b.3(i)(3) on the shares of a converted thrift will be applied to the stock of a thrift organized to acquire an insolvent thrift in a voluntary supervisory conversion. 12 C.F.R. 563b.10(c)(2). The Board has indicated that restrictions would likewise be applicable to the parent of the resulting thrift. *See* 51 Fed. Reg. 40137 (1986). The regulation provides that section 563b.3(i)(3) shall be applicable for eighteen months in the case of the acquisition of an insolvent institution with assets of between $500 and $750 million, such as SBS. In the case of the involuntary conversion of an insolvent institution under section 408(m) of the National Housing Act, the FSLIC may require, as a condition of its authorization, that similar limits be imposed on the shares of SBS, and thereby SSHC and Statesman.

h. For regulatory purposes, currently or subsequently scheduled items or classified assets will be excluded in the calculation of capital or ratio requirements of SBS for a period of five years.

i. FSLIC shall make available a line of credit for a period of two years for liquidity protection for SBS.

j. For a period of two years following the acquisition date, in determining whether a penalty shall be assessed against or paid by SBS pursuant to Section 523.12 (Deficiencies and Penalties) of the Rules and Regulations for the

Federal Home Loan Bank System ("Bank Regulations"), the liquidity requirements of Section 523.11 (Liquidity Requirements) of the Bank Regulations as applied to SBS shall be reduced by (1) the amount of SBS's liquidity deficiencies existing at the acquisition date and (2) any aggregate net withdrawals (excess of withdrawals over cash savings received) from SBS's offices after the acquisition date.

k. SBS will be entitled to establish additional branches in Florida and Iowa, including, but not limited to, Des Moines, Iowa, and to establish a consolidated headquarters office of SBS in Des Moines, Iowa.

l. In prior discussions with FSLIC concerning a bid proposal, it was Statesman's management's understanding that the establishment of branches in one additional state would be favorably considered by FSLIC. Statesman requests and requires as part of this bid proposal the right to establish branches of SBS in the State of Missouri.

m. Recognition by FSLIC that the preferred stock of Statesman owned by SBS will be a qualifying direct investment.

n. SBS shall be given 3 years, to phase out, dispose of or discontinue in an orderly manner, any acquired investments, activities, or operations inconsistent with the Home Owners' Loan Act of 1933 as amended (HOLA), provided that such action is taken at the earliest possible date without material loss to SBS.

o. SBS shall not for a period of 3 years, be deemed in violation of any of the provisions of Section 545.74 (Service Corporations) of the Rules and Regulations for the FSLIC by reason

that any activities of a service corporation acquired as part of the merger(s), at or before the effective date(s), are not approved or authorized by the Home Owners' Loan Act of 1933, as amended.

p. For a period of five years after the acquisition, for purposes of calculating SBS's building investment under Section 545.77 (Real Estate for Office and Related Facilities) of the Federal Regulations, all building investments in the acquired associations may be excluded.

q. The Board will provide the certification that the grounds set forth in section 1464(d)(b)(A)-(i)(ii), or (iii) of Title 12, United States Code, exist with respect to the Associations, or will exist in the near future in the absence of action by the Board.

6. *Exclusion of Certain Leases.* With the exception of a start-up period of not more than three months from the date of acquisition, Statesman will not assume or be responsible for the executive office lease of First Federated Savings Bank in Florida or of the office lease of Federated Financial Corporation in Atlanta, Georgia.

7. *Maintenance of Deposits.* This bid proposal is submitted on the assumption that there are approximately $631 million of deposits in the combined associations. In the event that the combined deposits should decrease by more than 10% by the actual data of acquisition, Statesman reserves the right to renegotiate its participation in the assumption of losses.

V. *Business Plan.*

Submitted herewith and incorporated by reference as part of the acquisition proposal is the Business Plan of the SBS. This Business Plan provides a description of the proposed acquisition and is supported by financial data of the combined associations, including three-year forecasts of quarterly volumes, rate/yield analysis, interest income/expense report, profit-loss report, ratio report, cashflow forecast, and a pro forma combined statement of condition as of December 31, 1987 of the four associations, as well as individual pro forma statements of condition of each association. This Business Plan, including the financial information submitted therein, forms the basis upon which the acquisition proposal is being made.

VI. *Management and Directorate of Acquirer.*

Attached hereto as Appendix B is a listing of the officers and directors of Statesman. Attached hereto as Appendix C is a listing of the officers and directors of American Life. No selection has yet been made of prospective directors for SBS. However, it is anticipated that one or more of the directors of Statesman and American Life would serve as directors of SBS and its holding company, and other directors would be selected on the basis of their experience and expertise regarding savings institutions, as well as their general proven business capabilities.

VII. *Authority of Acquirer.*

At a meeting of the Board of Directors of Statesman held on November 11, 1987, D. J. Noble was authorized on behalf of Statesman to enter into discussions and negotiations with FSLIC for the possible acquisition of federally-chartered savings institutions. Attached hereto as Appendix D is a letter dated December 4, 1987 from Whitfied, Musgrave, Selvy, Kelly & Eddy, counsel for Statesman, to

the Regional Director and Deputy Director of FSLIC setting forth this authority.

VIII. *Accountants' Statement.*

Submitted herewith as Appendix E is the requested statement from Ernst & Whinney, the independent accountants for Statesman, regarding the application of generally accepted accounting principles to the proposed transaction (purchase vs. pooling of interests), the estimated amount of unidentified intangible assets resulting therefrom, and the estimated amortization periods of such intangibles as presented in the accompanying Business Plan.

IX. *Tax Considerations and Benefits.*

Based upon the method of taxation of insurance organizations limiting utilization of non-life insurance operating losses, and the present loss carryforward position of the non-life insurance entities reflected in the consolidated Statesman tax return, loss carryovers of the acquired (non-life) associations may provide no tax benefits to Statesman. However, it is agreed that Statesman will cause an annual review of its tax position to be made through a with/without computation, and to the extent any tax benefits are actually realized in cash by Statesman directly from inclusion of the associations in the consolidated Statesman tax return, Statesman agrees to share 50% of those tax recoveries or payment reductions with FSLIC.

X. *Other Considerations.*

Statesman is the 60% owner of the holding company of Statesman Mortgage Company, which is located in

Des Moines, Iowa. It is anticipated that the mortgage business activities now being conducted by Federated Financial Corporation, the subsidiary of First Federated Savings Bank, will be transferred to Statesman Mortgage Company. Therefore, the financial projections contained in the Business Plan do not include future income and expense factors related to the business of Federated Financial Corporation.

The foregoing Acquisition Proposal and accompanying Business Plan is submitted by The Statesman Group, Inc. this 8th day of January, 1988.

The Statesman Group, Inc.

By _____

D.J. Noble
Chairman of the Board
and President

FEDERAL HOME LOAN BANK BOARD

FEDERAL SAVINGS AND LOAN
INSURANCE CORPORATION

BUSINESS PLAN

FIRST FEDERATED SAVINGS BANK,
WEST PALM BEACH, FLORIDA
FIRST FEDERAL SAVINGS BANK,
WATERLOO, IOWA
PEOPLES FEDERAL SAVINGS AND
LOAN ASSOCIATION, WATERLOO, IOWA
THE PERPETUAL SAVINGS AND
LOAN ASSOCIATION, WATERLOO, IOWA

January 1988

Submitted by the Management
of
The Statesman Group, Inc.
1400 Des Moines Building
Des Moines, Iowa 50309
(515) 284-7500

With the assistance of:

Ferguson & Company
600 E. Las Colinas Boulevard
Suite 1700
Irving, Texas 75039
(214) 689-1177

STATESMAN BANK FOR SAVINGS, FSB

CONTENTS

	Tab
Assumptions and Operating Scenario:	
Introduction	1
Description of Acquirer	1
Capital Infusion by Acquirer	1
FSLIC Assistance	1
Economic Environment	2
Promotion of Home Financing	3
Office Quarters	3
Personnel	3
Continuity of Management and Directorate	3
Lending and Investment	4
Acquisition of Capital	5
Interest Rate Risk Management	5
Direct Investments	5
Capital	6
Records, Systems and Controls	6
Corporate Opportunity, Transactions with Affiliates and Management Official Interlocks	6
Monitoring of the Business Plan	7
Revision of the Business Plan	7
Method of Accounting	7
Regulatory Considerations	7
Projected Financial Statements:	
Projected Statements of Condition	8
Projected Statements of Operations	9
Projected Statements of Sources and Use of Funds	10
Notes to Projected Financial Statements	11
Supplementary Financial Information:	
Projected and Pro Forma Statements of Condition:	
First Federated Savings Bank West Palm Beach, Florida	12

STATESMAN BANK FOR SAVINGS, FSB
(Continued)

CONTENTS

	Tab
Supplementary Financial Information (Continued):	
Projected and Pro Forma Statements of Condition (Continued):	
Federated Financial Corporation, a wholly owned subsidiary of First Federated Savings Bank	13
First Federal Savings Bank Waterloo, Iowa	14
Peoples Federal Savings and Loan Association Waterloo, Iowa	15
The Perpetual Savings and Loan Association, Waterloo, Iowa	16
All Associations Combined	17
Statesman Bank for Savings, FSB	18
Summary of Adjustments	19
Projected Interest Rates, Net Interest Income Analysis, Spread Analysis and Key Ratios	20
Significant Projection Assumptions—Assets	21
Significant Projection Assumptions—Liabilities	22
Projected Regulatory Capital Requirement	23
Projected Memo Items	24
Projected Lending and Leasing Activity	25

[Tab 1]

INTRODUCTION

The Statesman Group, Inc. ("Statesman" or "Acquirer") is submitting this Business Plan ("Plan") in connection with its proposal to the Federal Home Loan Bank Board ("Board"), the Federal Savings and Loan Insurance Corporation ("FSLIC"), the Federal Home Loan Bank of Des Moines and the Federal Home Loan Bank of Atlanta for the acquisition of First Federated Savings Bank, West Palm Beach, Florida; First Federal Savings Bank, Waterloo, Iowa; Peoples Federal Savings and Loan Association, Waterloo, Iowa; and The Perpetual Savings and Loan Association, Waterloo, Iowa.

The Plan assumes the acquisition is consummated on December 31, 1987 and that Statesman will acquire a unitary savings and loan holding company which will own a federally chartered savings bank, into which the assets and liabilities of the four associations are placed. The Plan and financial projections are presented for the resulting savings bank, hereinafter also referred to as "Statesman Bank for Savings, FSB" or "SBS".

The Plan projects a capital infusion in cash and preferred stock by Statesman, and/or its existing subsidiaries, initial financial assistance from FSLIC in the form of cash and an amortizing note receivable and continuing financial assistance in the form of cash from FSLIC. This assistance consists of spread and yield maintenance and guarantees of recovery by FSLIC of losses on certain assets ("Covered Assets"). The plan assumes that losses on other assets ("Uncovered Assets") will be assumed by SBS.

The Plan also assumes the acquisition will be accounted for using the purchase method of accounting, applied by the "push down" method, as of December 31, 1987. Purchase accounting is the method of recording a business acquisition by adjusting assets and liabilities to fair market value and setting net worth equal to the purchase price. "Push down" refers to recording the adjustments on the books of the acquired company.

In connection with the preparation of the Plan, Statesman engaged Ferguson & Company, consultants to the savings and loan industry, to assist in the preparation of the Plan and to identify improvement opportunities and make recommendations for further action. The findings and recommendations of Ferguson & Company are incorporated into the Plan, and such findings and recommendations have been reviewed and approved by Statesman.

DESCRIPTION OF THE ACQUIRER

Statesman is a financial services holding company which, through its subsidiaries, engages primarily in the business of life insurance, including annuities, and to a lesser extent, in the business of investment banking and retail brokerage and property-casualty insurance.

Although Statesman markets products in 47 states, the majority of its insurance business is conducted in the Midwest, California and the Southeast. Other financial services are provided primarily in the Midwest, Southwest and Western states through a regional investment banking and retail brokerage subsidiary. Statesman also has a mortgage banking subsidiary. Following is Statesman's condensed historical financial information for the periods indicated (dollars in thousands):

	December 31,		Sept. 30,
	1985(1)	1986(1)	1987(2)
Total assets	$555,117	$843,784	$1,192,085
Total liabilities	505,079	785,972	1,131,240
Stockholders' equity	49,308	57,057	60,468
Revenues	247,266	396,508	414,368
Benefits, losses and expenses	247,236	394,402	413,905
Net income	5,038	7,659	1,303

(1) Compiled from year-end audited financial statements.

(2) Compiled from Form 10-Q filed with the Securities and Exchange Commission (as of and for the nine months ended September 30, 1987).

CAPITAL INFUSION BY ACQUIRER

Statesman intends to capitalize SBS through a transfer of assets from the savings and loan holding company of $8.4 million in cash and $12.6 million of preferred stock of Statesman, the combined total being approximately 3% of projected total liabilities of the combined associations at December 31, 1987. The Plan also projects that Statesman will incur approximately $26 million in goodwill and other intangibles in the transaction.

FSLIC ASSISTANCE

The acquisition of the associations will require FSLIC assistance. At September 30, 1987, the associations reported a combined deficit in excess of $82 million.

The Plan projects FSLIC will initially contribute cash and a note receivable bearing interest at the Eighth District cost of funds plus 200 basis points and equal to the combined deficit, adjusted for (1) the write-off of recorded goodwill, other intangibles, deferred losses and appraised equity capital; (2) commercial real estate valuation allowances (excluding valuation allowances on single-family residential property or loans) adjusted for uncollectable accrued interest receivable; and (3) equity in the losses of Federated Financial Corporation, the wholly owned mortgage banking subsidiary of First Federated Savings Bank. The total initial FSLIC contribution is projected to be in excess of $115 million at December 31, 1987, of which thirty percent shall be paid in cash and seventy percent in the form of a note amortized over a period of five years.

The Plan also projects continuing FSLIC assistance in the form of quarterly cash payments equal to 93% of the losses on Covered Assets, which is assumed to be forty million dollars of the asset values for the Plan, plus spread and yield maintenance on Covered Assets equal to the Eighth District cost of funds plus 225 basis points. Covered Assets include all real estate owned, all investment real estate, all investments in and loans to subsidiaries and all nonperforming loans, each excluding first lien positions in one to four family residential dwelling units or loans, all as more fully set out in the proposal. For purposes of the Plan, Covered Assets are projected to be liquidated ratably over five years.

[Tab 7]

MONITORING OF THE BUSINESS PLAN

Statesman will prepare comprehensive operating budgets based upon the Plan and such budgets will be reviewed and approved by the Board of Directors. The actual operating results will be compared with the budgets and such reports will be reviewed by the Directors on a quarterly basis. This procedure will allow the Board to take corrective action pertaining to variances between budgeted and actual items and make necessary revisions to operating strategies to insure compliance with the Plan.

Monitoring of the Plan in its entirety will be evidenced in the minutes of the Board of Directors. A report of such review, together with an explanation of and justification for any proposed or material changes, will be submitted to the appropriate regulatory authority.

REVISION OF THE BUSINESS PLAN

Variances between planned and actual results may be temporary or permanent. Temporary variances may arise from the inexact process of measuring expectations of the future timing of transactions. These differences are not expected to require a revision of the Plan.

Permanent differences may arise from situations in which SBS has some control. During the process of the Board's review of the Plan and its comparison to actual operating results, the underlying assumptions used in the projections will be reviewed for validity

with current economic conditions, strategies and market expectations. Should revisions be required, the Board will authorize appropriate changes to the Plan. Any material or significant changes authorized by the Board will be reviewed with and approved by the Supervisory Agent.

METHOD OF ACCOUNTING

The projected financial statements have been prepared with purchase accounting being applied by use of the "Push Down" method. Inasmuch as the acquisition does not give rise to continuity of ownership, Statesman believes that application of the purchase method is appropriate and is in accordance with generally accepted accounting principles.

After the application of purchase accounting, the projected financial statements have been prepared as though the acquisition occurred on December 31, 1987.

REGULATORY CONSIDERATIONS

The Plan is based upon the assumption that certain regulatory forbearances and considerations will be granted. These are requested by Statesman as a result of dispensations necessary to consummate the transaction, along with the current financial condition of the associations. The Plan is based on the granting of the requested forbearances and considerations as itemized in or incorporated by reference in the bid proposal.

The financial data and projections submitted herewith form the economic basis upon which the proposal and the Business Plan were formulated.

[Tab 11]

STATESMAN BANK FOR SAVINGS, FSB NOTES TO PROJECTED FINANCIAL STATEMENTS

(1) *Significant accounting policies*

The accounting and reporting policies of Statesman Bank for Savings, FSB ("Bank") conform to generally accepted accounting principles and to general practices within the savings and loan industry.

(2) *Assumptions and estimates*

The projected financial statements are based on assumptions and estimates concerning future events and circumstances which were determined by the proposed purchaser.

The assumptions disclosed herein are those believed to be significant to the projections and/or are key factors upon which the financial results of the Bank depend and, unless otherwise indicated, are based on the circumstances and conditions that existed at the time the projections were prepared. Some assumptions will not materialize and unanticipated events and circumstances may occur subsequent to December 31, 1987, the date of this projection. Therefore, the actual results achieved during the periods covered by the projections will vary from the projections and such variations may be material. There are significant inherent risks in using outdated projections because events subsequent to their issuance may invalidate some or all of the

underlying assumptions and estimates. The assumptions used are listed in "Significant Projection Assumptions" included elsewhere in this Plan.

Cash and investments:

The projected cash and investment balances at the end of each projected period are the residual balances that result, in part, from application of the following assumptions and estimates and, in part, from expected efficiencies resulting from applications of improved cash management procedures.

Loans receivable:

Assumptions regarding mortgage loans and non-mortgage loans are listed in "Significant Projection Assumptions." This projected other data provides a listing of projected originations, origination rates and renewal rates, if applicable, for each respective loan classification. Interest income on loans receivable is calculated by the projection model with respect to the activity and rates listed in "Significant Projection Assumptions."

Federal Home Loan Bank stock:

FHLB stock is maintained in accordance with regulatory requirements over the projected period. The assumed dividend rate of FHLB stock during the three annual projection periods is listed in "Significant Projection Assumptions."

Property and equipment:

Depreciation expense has been projected based upon acquired amounts, adjusted to include the projected equipment purchases. Depreciation has been calculated on the straight-line method over the estimated useful lives of the assets.

Savings deposits:

All assumptions regarding transaction accounts, short term certificates of deposit, intermediate term certificates of deposit (over 6 months through 18 months), long term certificates of deposit (more than 18 months) and jumbo accounts are listed in "Significant Projection Assumptions." This projected other data provides a listing of the projected changes and average cost of each respective savings deposit classification. Interest expense on savings deposits is calculated by the projection model with respect to the activity and rates as summarized in "Significant Projection Assumptions."

Loan origination fees:

Loan origination fees are projected as a function of loan volume as outlined in "Significant Projection Assumptions." All fees are calculated, as appropriate, by the projection model at 1% and deferred and amortized by the level yield mentod over the loan life.

Other income and expense:

All other items of income and expense were projected from analyses of the actual respective amounts (per books) for 1987 with increases or decreases appropriate to the Plan.

Federal income taxes:

Federal income taxes have not been provided since permanent differences, primarily nontaxable FSLIC assistance, offset pretax accounting income.

Interest rate scenario:

The interest rate scenario included in the Plan is based upon the September 1987 Savings and Loan Industry Assumptions prepared by the Federal Home

Loan Bank Board, adjusted for local economic conditions. The interest rates are listed in "Projected Interest Rates, Net Interest Income Analysis and Spread Analysis" presented elsewhere in this Plan.

(3) *Accounting for the acquisition*

The accompanying projected financial statements have been prepared assuming purchase accounting is applied to record the acquisition of the Bank and that purchase accounting is applied by the "push down" method as of December 31, 1987. Purchase accounting is the method of recording a business acquisition by adjusting assets and liabilities to market value and eliminating net worth. "Push down" refers to recording the adjustments on the books of the acquired company.

Goodwill of approximately $25.8 million arising from the acquisition is being amortized over 12 years on the level yield method.

OMB No. 3068-0037
EXPIRES 4/30/88

Docket No.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION
Washington, D.C. 20552

APPLICATION H-(e)1

Application Pursuant to Section 408(e)(1)(B) of the National Housing Act and Section 584.4(b) of the Regulations for Savings and Loan Holding Companies for Approval of Acquisition of One Insured Institution, Directly or Indirectly, by a Company Other Than a Savings and Loan Holding Company.

American Life and Casualty Insurance Company
The Statesman Group, Inc.

Legal name of Applicant

1400 Des Moines Building, Des Moines, Iowa 50309

Address of principal executive office Zip Code

First Federated Savings Bank
First Federal Savings Bank
Peoples Federal Savings and Loan Association
The Perpetual Savings and Loan Association
Statesman Bank for Savings, FSB

Legal name of insured institution being acquired directly or indirectly (hereinafter called the Associations and Institution)

Statesman Savings Holding Corp.

Legal name of any savings and loan holding company being acquired (hereinafter called the Holding Company)

William J. Sweet, Jr., Esq.
Skadden, Arps, Slate, Meagher & Flom
1440 New York Avenue, N.W.
Washington, D.C. 20005-2107

Name and address of persons to whom communications are to be sent

H-(e)1
REV. JULY 1981

II. *INFORMATION REQUIRED BY ITEMS*

A. *GENERAL BACKGROUND*

Item 1. *Summary of Proposed Acquisition*

The proposed acquisition and any related transactions should be briefly summarized in a form that makes the acquisition and transactions readily understandable.

The Statesman Group, Inc., ("Applicant") headquartered in Des Moines, Iowa, proposes to acquire (the "Acquisition"), through a supervisory acquisition assisted by the Federal Savings and Loan Insurance Corporation ("FSLIC"), substantially all of the assets and liabilities of First Federated Savings Bank, West Palm Beach, Florida; First Federal Savings Bank, Waterloo, Iowa; Peoples Federal Savings and Loan Association, Waterloo, Iowa; and The Perpetual Savings and Loan Association, Waterloo, Iowa. (The four institutions are collectively referred to herein as the "Associations.") A copy of the acquisition proposal submitted to the FSLIC (the "Acquisition Proposal") is attached as Exhibit A. The Acquisition Proposal, a proposed assistance agreement, and other matters are now under negotiation.

As the first step in the Acquisition, Applicant intends to establish and incorporate Statesman Savings Holding Corp., a unitary savings and loan holding company (the "Holding Company"). The initial capital infusion into the Holding Company will be $21 million, of which 60% ($12.6 million) will be represented by preferred stock issued by Applicant to the Holding Company in exchange for preferred stock issued by the Holding Company to Applicant. The other 40% ($8.4 million) will be in the form of cash contributed by American Life and Casualty Insurance

Company (the "Insurance Company"), a wholly-owned subsidiary of Applicant, in exchange for voting common stock issued by the Holding Company to the Insurance Company. As a result, the Insurance Company will have voting control of the Holding Company.

As the second step in the Acquisition, the Holding Company will establish and incorporate Statesman Bank for Savings, FSB, a wholly-owned subsidiary federal savings bank (the "Institution"). The Holding Company will contribute all of the preferred stock issued by Applicant and all of the cash acquired from the Insurance Company to the Institution in exchange for all of the common stock of the Institution, thereby capitalizing the Institution in the amount of $21 million.

The third step of the Acquisition will be the purchase and assumption by the Institution of substantially all of the assets and liabilities of First Federated Savings Bank. The fourth step will be the conversion of each of the remaining three Associations and its merger into the Institution.

The Acquisition will be effected on a "turnkey" basis, with the FSLIC providing at its own cost for the establishment and incorporation of the Institution, transfer of assets and liabilities to the Institution, conversion and merger of the remaining Associations into the Institution, and recording and filing of all documents in accordance with various state and federal requirements.

Applicant has submitted a business plan (the "Business Plan"), enclosed separately as Exhibit B, in connection with the Acquisition Proposal. The Business Plan assumes the acquisition is consummated on December 31, 1987, and presents financial projections for the Institution. The Business Plan projects a

capital infusion in cash and preferred stock by Applicant and/or its existing subsidiaries, initial financial assistance from FSLIC in the form of cash and an amortizing note receivable, and continuing financial assistance in the form of cash from FSLIC. This assistance consists of spread and yield maintenance and guarantees of recovery by FSLIC of losses on certain assets. The Business Plan assumes that losses on other assets will be assumed by the Institution.

The Acquisition Proposal is subject to a number of specific terms and conditions, among which are certain regulatory forbearances and considerations to be granted or obtained by the FSLIC. These forbearances and considerations are listed at pages 7-16 of the Acquisition Proposal which is attached as Exhibit A, and are hereby incorporated by reference into this Application. Applicant wishes to emphasize the importance of the requested forbearances and considerations to the completion of the Acquisition, and the consequent need for the appropriate offices within the FSLIC to review the relevant issues at an early stage. Without in any way affecting the requested forbearances and considerations as set forth in the Acquisition Proposal and incorporated by reference herein, a summary of the forbearances and considerations requested is given below:

(a) For regulatory purposes with respect to the books and records of the Institution, push-down accounting shall be used to record the purchase of the Institution's capital stock by the Holding Company. Twenty one million dollars of the cash contribution to be made to the Institution pursuant to an assistance agreement to be entered into between the FSLIC and Applicant is to be a credit to the Institution's

regulatory capital; therefore, for regulatory accounting purposes, the Institution will book such contribution as a direct addition to its net worth.

(b) The FSLIC will permit Applicant and the Holding Company to enter into a capital maintenance agreement for the Institution that is limited to: (i) an agreement to infuse capital in order to maintain the regulatory capital of the Institution at a level consistent with that required by 12 C.F.R. § 563.13(b) as now or hereinafter in effect, *provided* that the aggregate amount of this obligation shall not exceed $4 million; and (ii) an agreement that in the event the Institution's ratio of regulatory capital to total liabilities at the end of any given calendar quarter falls below 2 percent, without prompt remedy, the FSLIC will have the right to vote the securities acquired by Applicant and the Holding Company, remove the Institution's board of directors, and/or dispose of any or all of the voting securities of the Institution.

(c) The FSLIC will give permanent and continuing approval to the issuance of debt by Applicant and its affiliates (or waive the debt requirement under section 408(m) of the National Housing Act), so long as the regulatory capital of the Institution meets the amount required at the time the debt is issued.

(d) The FSLIC will authorize the acquisition under section 408(m) of the National Housing Act, 12 U.S.C. § 1730a, will determine under such authority that Applicant and its affiliates are exempt from the operation of section 408(p) of the National Housing Act, 12 U.S.C. § 1730(p), with respect to the cross-marketing of products or services between the Institution and Applicant, its subsidiaries or its affiliates, and will confirm that such sales, as described herein, are consistent with section 408(d) of the National Housing Act.

(e) The acquisition will occur pursuant to FSLIC authorization under section 408(m) of the National Housing Act, 12 U.S.C. § 1730a, and the FSLIC will affirmatively find that such authorization preempts the laws of any state that would limit or preclude the affiliation of the Institution and Applicant or any of its insurance affiliates or would, by reason of such affiliation, prohibit the sale of insurance by Applicant, its insurance affiliates or agents.

(f) The acquisition will occur pursuant to authorization under section 408(m) of the National Housing Act.

FEDERAL HOME LOAN BANK BOARD
907 Walnut Street
Des Moines, Iowa 50309

OFFICE OF SUPERVISORY AGENT—
EIGHTH DISTRICT

MEMORANDUM

DATE: FEBRUARY 26, 1988

TO: Linda Plye, Director of Corporative Activities

FROM: Daniel T. McKee
Supervisory Agent

John A. Pringle
Supervisory Agent

RE: S-Memorandum—Proposed
FSLIC-Assisted Acquisition
of

First Federal Savings Bank	TL $196.8 Million
Waterloo, Iowa	TA $152.4 Million
FHLBB Docket No. 2321	NW ($44.4) Million NW/TL (22.6%) NW/TA (29.1%) Data as of 12/31/87
	and
Peoples Federal Savings and Loan Association	TL $154.8 Million
	TA $152.4 Million
Waterloo, Iowa	NW ($2.4) Million
FHLBB Docket No. 5965	NW/TL (1.6%) NW/TA (1.6%) Data as of 12/31/87

	and
The Perpetual Savings and Loan Association	TL $123.6 Million TA $118.9 Million
Waterloo, Iowa	NW ($4.7) Million
FHLBB Docket No. 4477	NW/TL (3.8%) NW/TA (3.9%) Data as of 12/31/87
	by
Statesman Group, Inc.	TL $1,131.2 Million
Des Moines, Iowa	TA $1,192.1 Million
Private Investor	NW $60.9 Million NW/TL 5.4% NW/TA 5.1% Data as of 9/30/87

I. *GENERAL RECOMMENDATION*

First Federal Savings Bank ("First Federal") and Peoples Federal Savings and Loan Association ("Peoples") are FSLIC-insured, federally chartered mutual institutions with home offices in Waterloo, Iowa. The Perpetual Savings and Loan Association ("Perpetual") is an FSLIC-insured, state chartered mutual institution with its home office also in Waterloo, Iowa. First Federal has one branch each in Oelwein, LaPorte City, Dubuque and Waterloo, and two branches in Cedar Falls. Peoples has one branch each in Manchester, New Hampton, Sumner, Traer, Union, Waterloo and Elkader, and two branches in Cedar Falls. Perpetual has one branch each in Parkersburg, Waterloo and Jesup, and two branches in Waverly.

On December 11, 1987, these three institutions were bid nationwide on an assisted basis along with First Federated Savings Bank, North Palm Beach, Florida. One bid was received by the January 20, 1988, deadline, from the Statesman Group, Inc. ("Statesman"), Des Moines, Iowa. Their bid is less than the cost of liquidation of the three Waterloo institutions along with the North Palm Beach institution.

As reflected in current financial data of the three individual Waterloo institutions, each has a negative net worth. First Federal has a continuing trend of monthly operating losses. Peoples and Perpetual have generated nominal monthly operating income, resulting in an annualized return on assets of 0.1% for both institutions. Given the three

institutions' financial condition and the acceptable acquisition proposal from Statesman, an FSLIC-assisted acquisition at this time will minimize the eventual cost of resolution to the FSLIC. Accordingly, we recommend that the FHLBB approve the proposed FSLIC-assisted acquisition of First Federal, Peoples and Perpetual by Statesman.

The proposed transaction is expected to be accomplished as follows:

The Bank Board would allow a supervisory merger of the four institutions; approve the establishment and incorporation of Statesman Savings Holding Corp. and Statesman Bank of Savings, FSB; transfer the assets and liabilities of the combined institutions to Statesman Bank of Savings, FSB; and permit Statesman Bank of Savings, FSB, to establish branches in the State of Missouri in addition to the branching rights associated with the acquisition of the Iowa and Florida institutions. The FSLIC would provide cash (30%) and promissory note (70%) contribution totaling approximately $115,000,000; pay 93% of losses on covered assets for five years from the date of acquisition; provide yield maintenance on covered assets; indemnify Statesman, its subsidiaries, affiliates, officers, directors and employees for five yeas; and grant certain regulatory forbearances and considerations.

II. *FINANCIAL STATUS OF PROBLEM INSTITUTIONS*

A. *First Federal*

The institution's most recent quarterly report dated December 31, 1987, indicated

average monthly net operating deficits of $666,667. Total regulatory net worth was a negative $44.4 million.

As of December 31, 1987, it is estimated that the institution has unbooked losses of $11.3 million. The majority of these losses, approximately $9.3 million, are the result of the institution's investments in large commercial real estate loans.

During late 1982, the prior Board and President decided to have the institution "outgrow" the problem of its old, underwater loan portfolio. The institution failed to operate profitably while growing over 90% in 20 months. The institution invested its proceeds from growth into commercial real estate loans on a nationwide basis. These consisted primarily of construction and AD&C loans. Because of the Board's and President's unsafe and unsound practices, they were replaced on November 5, 1987.

Since the August 31, 1987, supervisory examination, First Federal has been virtually unsuccessful in working out its problem assets. The new Board and President provide the institution with a good personnel base to successfully work out some of the problem loans and real estate owned.

The following summarizes First Federal's relevant financial history:

	Annual Periods Ended (in thousands)		
	12-31-87	*12-31-86*	*12-31-85*
Assets	$152,402	$191,957	$236,719
Net Worth	($44,389)	($31,864)	($7,007)
Net Worth/Assets	(29.13%)	(16.60%)	(2.96%)
Interest-Earning Assets/Interest-Bearing Liab.	61.22%	69.44%	84.44%
Net Interest Margin on Average Earning Assets	(2.80%)	(2.49%)	(0.56%)
Net Income	($12,527)	($24,884)	($9,031)
Operating Expense/Average Assets	2.42%	2.05%	1.91%
1 Year Hedged GAP	(50.09%)	(34.85%)	(25.09%)
Scheduled Items/Assets	35.77%	23.54%	14.74%
Liquid Assets/Savings Deposits	6.35%	10.10%	6.16%

B. *Peoples*

The institution's December 31, 1987, quarterly report indicated a deficit regulatory capital of $2.4 million. Although the institution reported nominal income of $96,000 for the three month period ended December 31, 1987, losses, excluding a $4.3 million loan loss reserve in June 1987, have average $20,000 a month for the 12-month period ended December 31, 1987. An estimated 20 percent of assets are in delinquent local 1-4 family mortgage loans, and local 1-4 family REO and REJ. Combining these assets with the continued poor condition of the local economy will preclude this institution from sustaining periods of profitability or returning to solvency in the near future.

In addition, due to the continuing poor condition of the local economy, this institution may have unreserved losses on loans in excess of $2.5 million.

The following summarizes First Federal's relevant financial history:

	Annual Periods Ended (in thousands)		
	12-31-87	*12-31-86*	*12-31-85*
Assets	$152,444	$165,225	$166,315
Net Worth	($2,413)	$1,977	$2,693
Net Worth/Assets	(1.58%)	1.20%	1.62%
Interest-Earning Assets/Interest-Bearing Liab.	90%	90%	91%
Net Interest Margin on Average Earning Assets	1.62%	1.45%	1.12%
Net Income	($4,392)	($715)	($343)
Operating Expense/Average Assets	1.60%	1.50%	1.50%
1 Year Hedged GAP	(29.57%)	(27.10%)	(30.78%)
Scheduled Items/Assets	20.86%	20.05%	13.66%
Liquid Assets/Savings Deposits	5.30%	7.60%	3.90%

C. *Perpetual*

The institution's most recent quarterly report dated December 31, 1987, indicated a deficit regulatory net worth of $4.7 million. Net operating income which has averaged $12,917 per month during 1987, is insufficient to cover losses on the sale of real estate owned and provisions for losses on loans.

As of December 31, 1987, the institution had unbooked losses of approximately $595,000, which were identified at the November 16, 1987, examination. The majority of the losses suffered by the institution are attributable to the depressed local economy and to second mortgage loans purchased from First American Mortgage Company.

The following summarizes Perpetual's relevant financial history:

	Annual Periods Ended (in thousands)		
	12-31-87	*12-31-86*	*12-31-85*
Assets	$118,931	$139,202	$143,916
Net Worth	($4,681)	$428	$1,819
Net Worth/Assets	(3.94%)	0.31%	1.26%
Interest-Earning Assets/Interest-Bearing Liab.	83.75%	83.72%	85.89%
Net Interest Margin on Average Earning Assets	1.91%	1.88%	1.88%
Net Income	($4,255)	($2,247)	($54)
Operating Expense/Average Assets	1.81%	1.75%	1.58%
1 Year Hedged GAP	(24.50%)	(23.34%)	(20.82%)
Scheduled Items/Assets	13.73%	13.93%	7.22%
Liquid Assets/Savings Deposits	7.58%	6.93%	8.31%

D. *Condition of Industry in Des Moines Bank District*

There are 188 insured institutions in the Eighth Federal Home Loan Bank Board ("FHLBB") District. Assets of these insured institutions totaled $54.7 billion as of December 31, 1987.

As of December 31, 1987, it is projected that twenty (20) Eighth District insured institutions, representing assets of $4.1 billion or 7.5 percent of total Eighth District insured assets, will be insolvent within the next 12 months.

Out of the 50 member institutions in Iowa, eight (8) are currently insolvent with $1.1 billion in assets, comprising 12.1 percent of total Iowa member assets. The average net worth of Iowa institutions equaled 1.8 percent of assets as of December 31, 1987. In addition, 30 Iowa member institutions reported net worth levels in excess of 3 percent as of December 31, 1987.

III. *SUPERVISORY HISTORY*

A. *First Federal*

First Federal was incorporated in 1878 as a state chartered savings and loan association, became a bank member in 1934, converted to a federally chartered savings and loan association and received insurance of accounts in 1953, and converted to a federally chartered savings bank in 1983.

In 1981 and 1982 First Federal had operating losses of $1,654,002 and $3,108,302, respectively. The institution's mismatch of asset and liability maturities during this rising interest rate period caused the bulk of these losses. Also, during this same time period, First Federal's lending area became generally depressed with little sign of improvement. In order to reverse these operating losses and counteract the Waterloo economy, First Federal undertook a total reorganization in September of 1982. The institution planned to grow from $140 million to $500 million in assets by December 31, 1987. The proposed growth strategy was to be achieved by incresing business thrust (e.g., financial intermediary, mortgage banking—multi-locations, real estate development, and expanding other services); diminishing the negative effect of old assets by acquiring new assets at a positive spread; buying mortgage banking servicing income streams; discounting GNMA or other favorable accounting strategies; using purchase method accounting where applicable as mergers occur; and buying out-of-state loans.

From September 1982 to June 1984 First Federal's assets increased from $140 million to $238 million. A large percentage of this increase was initially funded through borrowed money and brokered deposits and invested in large loans purchased in the secondary market. The institution increased their senior management staff by one person in December of 1982 to accommodate this growth. The new senior manager specialized in large real estate loans. His goal, at the direction of his superiors, was to raise $1.4 million in loan fees during 1983.

On January 6, 1984. First Federal consummated an unassisted supervisory merger with Oelwein Federal Savings and Loan Association ("Oelwein Federal"), Oelwein, Iowa. This merger was approved by the FHLBB and the Supervisory Agent ("SA"). Oelwein Federal had $13 million in assets and approximately $100,000 in net worth as of the merger date. First Federal was the surviving institution.

The December 9, 1983, supervisory examination revealed a continued mismatch in asset/liability maturities; but, more importantly, a lack of proper underwriting procedures (including inadequate appraisals) on loans purchased in the secondary market, and minimal analysis of loans and participations purchased. In addition, scheduled items increased significantly and it appeared that the Waterloo economy was worsening.

The SA met with First Federal's board of directors on March 2, 1984, to discuss the December 9, 1983, examination. It was noted

during the meeting that a follow up to this exam would begin during the coming weeks to determine if the institution has taken corrective actions regarding deficient lending practices.

The March 14, 1984, supervisory examination noted that during the 14 months ended February 29, 1984, $79 million of loans and participations were purchased. This activity provided management with the loan fee income needed to meet its $1.4 million goal. During this time period, the institution had inadequate resources to devote to this lending activity. On June 18, 1984, First Federal executed a Supervisory Agreement regarding loan underwriting at the request of the SA.

On November 1, 1984, the SA met with First Federal's board of directors to discuss the September 14, 1984, supervisory examination report. The SA was concerned with the institution's rapid growth and investments in commercial real estate, combined with a decreasing net worth ratio. The SA requested that the institution revise its business plan to disallow the granting of any additional AD&C loans or other types of new commercial real estate construction loans. The SA also requested that the institution submit for his review a written detailed quarterly status report for each loan cited in the examination report. Finally, the board of directors were reminded of their fiduciary responsibilities.

The high degree of risk First Federal assumed in the loans and participations purchased during 1983 and 1984 took their toll on the institution's

net worth following the March 2, 1985, supervisory examination. Continued severe operating deficiencies caused by excessive nonperforming assets and nearly $3.6 million in indicated loan losses more than depleted the $1.9 million net worth as of February 28, 1985.

As a result of the March 2, 1985, examination report findings, the SA held a meeting with the institution's board of directors on April 30, 1985. At that meeting the SA requested that the board execute a Consent Resolution. The board signed the Consent Resolution on May 22, 1985.

First Federal was shopped in accordance with standard Federal Home Loan Bank Board procedures in June of 1985. No institutions or investor groups were interested on an unassisted basis. A bid packet was sent to interested parties on September 13, 1985, requesting bid proposals to be submitted by October 7, 1985. A bid was submitted by First Financial Savings Bank ("First Financial"), Des Moines, Iowa, and Midland Financial Savings and Loan Association ("Midland"), Des Moines, Iowa. Midland's bid was unacceptable upon receipt and First Financial's bid was deemed unacceptable by FSLIC during June of 1986. Also, on June 17, 1986, First Financial withdrew its merger applications to acquire First Federal on an assisted basis.

The February 3, 1986, supervisory examination indicated an asset portfolio heavily weighted with loans secured by major commercial real estate projects. These loans were secured by properties in Texas, Oklahoma, Colorado, Florida, Nevada, Washington, Hawaii, Minnesota,

and Iowa. On many of the participations, First Federal is a minor participant in the loan and, thus, has virtually no control over the asset. Possible losses on these major projects totaled $15 million. Sixty-eight percent of the $105.5 million in large commercial real estate loans purchased or originated by First Federal were subject to adverse comment at this exam. In addition, the institution's operating losses reached $1.0 million per month in 1986. The SA met with the institution's board of directors on June 18, 1986, to discuss the February 3, 1986, examination.

The SA met with the institution's board of directors on May 1, 1987, to discuss its current financial condition.

During the early part of 1987 the SA began interviewing individuals to replace the current board of directors and President at First Federal. On May 21, 1987, FSLIC indemnification was requested for five prospective directors and a prospective President to replace the current board and President at First Federal. An indemnification agreement was obtained from the FSLIC on September 21, 1987. The SA met with First Federal's board of directors on November 5, 1987, and discussed with them the need to bring on new personnel as board members and President of the institution. During that meeting, all members of the board and the President resigned. The new board and President were appointed at the same meeting.

At the second meeting of the new board, November 19, 1987, the SA met with the

members to discuss the June 16, 1987, supervisory examination report. The new board was also presented with a new Consent Agreement for their review and execution. The new board signed the new Consent Agreement on January 21, 1988.

The following table provides a listing of First Federal's recent examination reports and ratings:

Date	*Exam Type*	*Composite Evaluation*	*CRA Evaluation*
06-16-87	Supervisory	5	3
04-02-87	Special	5	3
02-25-87	Special	5	3
01-28-87	Special	—	—
02-03-86	Supervisory	5	3
03-02-85	Supervisory	5	3
09-14-84	Supervisory	5	3
08-22-84	Supervisory	4	3
03-14-84	Supervisory	4	3
12-09-83	Supervisory	4	3
04-13-83	Special	3	3
09-27-82	Supervisory	3	3
06-01-82	Special	4	—
12-03-81	Supervisory	4	2
11-21-80	Supervisory	2	3
08-03-79	Supervisory	2	2

B. *Peoples*

Peoples was incorporated as a state chartered mutual savings and loan association on January 25, 1879. The institution became a member of the Federal Home Loan Bank of Des Moines on March 1, 1956, and received insurance of accounts

on February 28, 1956. Peoples was a state chartered institution (Peoples Mutual Savings and Loan Association) until it merged with Peoples Federal Savings and Loan Association, Cedar Falls, Iowa, and became a federal charter at that time.

This institution received composite ratings of "2" and "3" up until the annual examination of December 1, 1984, at which time the institution received composite ratings of "4" and "3." Prior to this, although ratings were not particularly adverse, examinations did note significant losses, resulting from inadequate net interest margins. Peoples suffered the normal post deregulatory spread problems, the result of fixed rate loans yielding well below the institution's increasing cost of funds. In addition, this institution's normal lending territory was increasingly becoming depressed due to agricultural difficulties, the result of which was an increasing amount of nonearning assets. All of these factors led up to a somewhat weak capital position, prior to Peoples' more serious supervisory concerns.

Peoples' December 1, 1984, examination disclosed a composite rating of "4." This rating was due primarily to a capital position which had been reduced to $1.7 million, losses of $967,000 for the period, and scheduled items which were noted to be $13.6 million or 8.1% of assets. The losses were due primarily to reserves for uncollected interest and appraised losses on nonearning assets. As a result of these findings, the SA requested to meet with this board to discuss methods of alleviating the above concerns. Items discussed by the SA were merger proposals,

possible capital infusion and branch sales. Corrective measures were properly addressed in response to the SA.

Another meeting was held with the board of this institution on November 21, 1985. High scheduled items, further losses, and inadequate spreads were discussed. The SA requested a net worth action plan at this meeting so as to document this institution's plan for a return to capital adequacy.

The December 31, 1985 examination disclosed continuing problems created by the weak economy in the Waterloo area. Scheduled items had increased to 15.2% of assets and were comprised entirely of loans on 1-4 family type properties. Although net worth had increased slightly, it was due primarily to nominal profits which occurred due to softening interest rates. As a result of these findings, the SA advised the institution that a return to sustained periods of profitability and adequate net worth were not likely and the institution should immediately seek a merger partner or some sort of capital stock conversion to alleviate these concerns. This letter also discussed the institution's net worth action plan requested earlier. The SA notified the institution that the plan was not adequate in that it did not display a return to capital adequacy. The board was instructed to continue working on the action plan and explore new areas of restructuring.

The SA again requested to meet with this board in December of 1985. The meeting, held January 27, 1986, checked the progress of the institution

in terms of net worth action plans, stock conversions, decreasing size, and branch sales. Many of these items did not occur because the institution was unable to effectuate any of the events in a proper manner. Although a net worth action plan was in place, little progress was noted toward capital improvement as the economy was far too weak for improvement.

The next course of supervisory action at this institution was a Supervisory Agreement, which was obtained on August 20, 1986, and was the result of continued losses and a projected insolvency of less than one year. The Agreement was standard and covered such items as lending, investment and other operating criteria. The institution has complied with this Agreement.

In March of 1987, the SA met again with this board to discuss the institution's business plan and progress thereto. We notified the board that the upcoming examination would likely result in the depletion of all of the institution's net worth due to asset classifications. Previous to this, the institution had not been subject to classification. In addition, continued operating losses were being caused by a high level of nonearning assets. We also discussed a proposed merger and capital conversion plan organized by Peoples and Perpetual. A proposed investor was to inject several million dollars into the combined institution as well as obtain several million dollars in FSLIC assistance. The Agreement did not occur as the feasibility of the combined institution was questionable.

The next item of supervisory concern at this institution was dated April 25, 1987, and concerned a memo from the examiners to the Principal Supervisory Agent. An examination which commenced March 23, 1987, would require Doubtful and Loss classifications of $8 million and, in turn, loss reserves of $4.2 million. This exhausted all of Peoples' net worth. Total classified assets amounted to $30 million or 18.2 percent of assets. The institution at this time was given a "5" rating. The exam noted that the institution's primary problems were due to severe economic conditions and that management had failed to take aggressive steps to reduce the level of REO and problem assets. The exam also noted concerns with the institution's level of interest rate risk, business plan, and a year end operating loss of $711,000.

A supervisory letter sent May 28, 1987, requested corrective action with regard to all concerns as well as a loss reserve of $4.2 million. The reserve rendered the institution insolvent and, thus, a Consent Agreement dated June 17, 1987, was obtained. The Consent Agreement prohibits the institution from any lending, except certain residential mortgage and consumer loans, and other operational matters without prior written approval of this office.

The final supervisory matter concerning this institution was a special limited examination completed October 19, 1987. The examination was conducted to determine compliance with the Consent Agreement. It was reported that in several instances the institution was not in compliance with the Agreement; however, Supervision determined that the violations were

inadvertent and have not occurred subsequent to the examination.

On December 23, 1987, Peoples submitted a capital forbearance application which will be denied due to the lack of sufficient earnings to restore capital to the minimums required by Section 563.13 within a reasonable period of time. In conjunction with the forbearance application, a proposed merger plan between Peoples and Perpetual was also submitted. The proposed merger would combine the two insolvent institutions with the intention of achieving operating economies of scale. The proposal would not result in the resolution of the two FSLIC cases as does Statesman's acquisition proposal.

The following table provides information regarding Peoples' examination report findings.

Date	*Exam Type*	*Composite Evaluation*	*CRA Evaluation*
10-19-87	Special	5	3
03-23-87	Supervisory	5	3
12-31-85	Supervisory	4	3
12-01-84	Supervisory	4	3
09-09-83	Supervisory	2C	3
08-14-82	Joint Supervisory	2C	3
06-19-81	Joint Supervisory	2B	3
02-29-80	Joint Supervisory	1B	3

C. *Perpetual*

Perpetual was incorporated as a state chartered mutual savings and loan association on April 1, 1890. The institution became a member of the Federal Home Loan Bank of Des Moines on

March 10, 1938, and received insurance of accounts on December 26, 1950.

Perpetual received composite ratings of "2" and CRA ratings of "3" prior to 1982. The institution operated free of any significant supervisory concerns; however, in 1981, operating losses due to a rapid increase in the cost of savings began to adversely impact the institution's capital position.

In October 1982, the institution decided to refinance a large amount of Federal Home Loan Bank advances, incurring prepayment penalties of approximately $2 million. The institution had incorrectly believed that such losses could be deferred and amortized over time. The subsequent examination, as of December 27, 1982, disclosed concern over the impact of the continued operating losses and prepayment penalties on the institution's net worth position. The institution was assigned a composite rating of "3."

A meeting with the board of directors was held on January 24, 1983, to discuss the examination results and deteriorating net worth. Another meeting with the board was held November 27, 1984, to again discuss the institution's net worth position.

Off-site monitoring in September 1984 revealed deterioration in asset quality with significant increases in real estate owned and past due loans. As a result, an examination commenced October 27, 1984. Operating lossed continued to drain the institution's net worth which, as of

September 20, 1984, represented 1.1 percent of total assets. Also of concern was the increasing level of scheduled items (3.9 percent of total assets) and a high level of interest rate risk. During the examination, the examiners discovered that the institution had funded a $1 million purchase of second mortgage loans from First American Mortgage Company, Inc. ("FAM"), and issued a commitment to purchase an additional $9 million of this type of loan which was to be funded in November 1984. The underlying loans were not available for review at this examination; however, the review of a sample loan revealed a high degree of risk, with borrowers having poor credit histories and questionable repayment ability. The borrowers were charged annual percentage rates of up to 30 percent. The loans were allegedly 100 percent insured against default by Rockwood Insurance Company, and the institution's investment was dependent on the insurance rather than the individual borrowers. The institution's composite rating at this examination was lowered to a "4."

On January 9, 1985, a meeting with the board of directors was held to discuss the results of the October 1984 examination and the quality of the FAM loans.

An examination was performed on March 20, 1985, to review the status of the FAM loans. It was determined that, as underwritten, the $10 million in FAM loans represented a commercial loan, and an excessive concentration of credit to one borrower. The institution was requested to divest itself of the investment to within the level provided by the commercial loans-to-one-

borrower regulation. The composite rating remained a "4."

A meeting was held with representatives of FAM on June 11, 1985, to discuss the operations of FAM and the problems that the regulators had with the FAM loans. The lack of adequate documentation and the failure of the institution to include this type of loan in their underwriting guidelines were the two primary items of concern which led to the examiners' classification of these loans as commercial loans to FAM. However, the institution was notified on September 10, 1985, that the loans could be considered real estate loans if the two criteria, previously mentioned, were met. Correspondence from the institution on September 13, 1985, advised this office that the board adopted a resolution to include this type of loan in its underwriting standards and they would pursue FAM to obtain needed documentation and delinquency reports.

At the November 7, 1985, examination, the viability of the institution was questioned due to the low level of net worth and problems associated with the FAM loans. A law suit was filed against FAM by E.F. Hutton, a loan purchaser, alleging fraud and breach of contract in FAM's loan servicing and misappropriation of funds by FAM and its chairman. Also of concern, regarding the collectibility of these loans, was the failure of the institution to have the individual mortgages and loss payee provisions of the surety bond assigned to them. A new servicer was hired and began reviewing the files to determine the delinquency status of the individual loans. Scheduled items, which continued to increase due to the depressed local

economy of Waterloo, Iowa, represented 6 percent of total assets at this review.

A meeting with the board of directors was held on January 15, 1986, at the request of the institution, to discuss director liability and other issues of concern, which included the FAM loans and the November 1985 examination report. Lawsuits had been filed against FAM by individual borrowers in two states seeking relief due to unconscionable interest and points. The institution's eligibility for a supervisory conversion to stock was also discussed.

The May 13, 1986, examination report disclosed further deterioration in the condition of the institution. The delinquency report on the FAM loans showed 47 percent of the loans were past due 90 days or more, and a loss of $875,000-$1,283,000 was estimated by the new servicer. Litigation against FAM continued in Alabama and South Carolina with potential losses on loans in these states of 100 percent and 40 percent, respectively. The institution's composite rating was lowered to "5" at this examination.

The board of directors signed a Consent Agreement on July 16, 1986, due to the anticipated insolvency of the institution.

A proposal for a merger between Perpetual and Peoples was submitted to this office for review in October 1986. The proposal stated that an investor would infuse up to $9 million of fresh capital, if the FSLIC would infuse $13 million. The proposal was rejected because 1) it represented the merger of two weak institutions

which was against FSLIC policy, 2) the investor never committed the funds, and 3) an extensive shopping procedure would have to precede such a plan.

An examination performed as of October 20, 1986, disclosed an insolvent institution with serious earnings problems and a high level of scheduled items (11.9 percent of total assets). The institution incurred a net loss of $2,281,000 for fiscal year end September 1986. The majority of the loss, $1,594,000, was due to specific loss reserves established for FAM loans. Concern over management and the board's willingness and ability to comply with the Consent Agreement was also noted, as several deficiencies were disclosed during the examination. The institution's composite rating remained a "5."

The case was transferred to the FSLIC on February 26, 1987.

A meeting with the board of directors was held on March 18, 1987, to discuss the October 1986 examination and the status of the FAM loans. The institution had in excess of $7.8 million of FAM loans outstanding, with loss reserves of $1.5 million recorded and additional reserves of $1.2 million to be made.

On December 23, 1987, Perpetual submitted a capital forbearance application which was subsequently denied due to the lack of sufficient earnings to restore capital to the minimum level required by Section 563.13 within a reasonable period of time. In conjunction with the forbearance application, a proposed merger plan

between Perpetual and Peoples was also submitted. The proposed merger would combine the two insolvent institutions with the intention of achieving operating economies of scale. The proposal would not result in the resolution of the two FSLIC cases as does Statesman's acquisition proposal.

An examination was performed as of November 16, 1987, and disclosed no improvement in the condition of the institution. Management has been unsuccessful in reducing the level of problem assets and limiting the institution's level of losses. Unreserved losses identified at this examination totaled $595,000. The institution reported a net loss of $3.8 million for its fiscal year ending September 30, 1987, which represents a return on average assets of the negative 2.9%. The net loss, which is primarily due to losses on the sale of real estate owned and provision for losses on assets, had reduced the institution's regulatory net worth position to negative $4.2 million, or 3.4% of total assets as of September 30, 1987. The examination report indicated that the level of problem assets remains high, representing 13% of total assets. A meeting with the institution's board of directors has been requested to discuss the results of this examination.

The following table provides information regarding Perpetual's examination report ratings:

Date	*Exam Type*	*Evaluation*	*Evaluation*
11-16-87	Joint Supervisory	5	3
10-20-86	Joint Supervisory	5	3
05-13-86	Joint Special	5	3
11-07-85	Joint Supervisory	4	3
03-20-85	Joint Supervisory	4	3
10-27-84	Joint Supervisory	4	3
09-17-83	Joint Supervisory	2	3
12-27-82	Joint Supervisory	3	3
10-31-81	Joint Supervisory	2	3

IV. *PLEDGED ACCOUNTS*

There are no pledged accounts at First Federal, Peoples, or Perpetual.

V. *PERSONNEL ISSUES*

There are no significant personnel issues at Peoples or Perpetual.

The new President of First Federal has a contract with the institution. This contract is attached as Exhibit S-9. The contract may be terminated by either party at any time and for any reason by giving thirty (30 days written notice to the other party, but any termination by the board of directors of First Federal other than termination for cause, shall not prejudice the Manager's right to compensation or other benefits under the contract.

VI. *ACCOUNTING ISSUES*

The proposed transaction will be accounted for according to Generally Accepted Accounting Principles (GAAP).

VIII. *SERVICE CORPORATION ISSUES*

There are no significant service corporation issues at Peoples related to this transaction.

One of First Federal's second tier service corporation, Combined Mortgage, Phoenix, Arizona, is jointly owned with Occidental/Nebraska Federal Savings Bank, Omaha, Nebraska. There are no other significant service corporation issues at First Federal related to this transaction. One of Perpetual's three services corporations, Perpetual Services Corporation, engages in real estate sales. This activity, which is permitted under the Iowa regulations governing states chartered institutions, is not permitted under Federal Regulations (Section 545.74). If the resulting institution is federally chartered, this issue will need to be addressed.

VIII. *FIDELITY BOND/D&O POLICY*

First Federal's fidelity bond and D&O coverage was canceled on August 20, 1985. A discovery bond was purchased at that time for a three month period. The institution has not been able to obtain a fidelity bond or D&O coverage since the cancellation.

Peoples' fidelity bond expired November 22, 1987, and the institution has been unable to obtain coverage elsewhere.

Perpetual's surety bond expired in April 25, 1987, and the institution has been unable to obtain coverage elsewhere.

Daniel T. McKee, Supervisory Agent

John A. Pringle, Supervisory Agent

Attachments
cc: Roger Lerner, MAD, FSLIC
Michael Fanaroff, MAD, FSLIC
Eric Berg, OGC, FHLBB
John Wooten, ORPOS
Jay Jupiter, MAD, FSLIC

March 11, 1988

Office of Regulatory Policy

Oversight and Supervison

Memorandum for: John M. Buckley, Jr.
Executive Secretary to the Board

From: Darrel W. Dochow
Executive Director

Subject: FSLIC-Assisted Acquisition of:
First Federal Savings Bank
Waterloo, IA
FHLBB No. 2321

Assets:	$152.4 million
Liabilities:	$196.8 million
Reg. Capital:	($44.4) million
RC/Liabs.:	(29.1%)

and
Peoples FS&LA
Waterloo, IA
FHLBB No. 5965

Assets:	$152.4 million
Liabilities:	$154.8 million
Reg. Capital:	($2.4) million
RC/Liabs.:	(1.6%)

and
Perpetual S&LA
Waterloo, IA
FHLBB No. 4477

Assets:	$118.9 million
Liabilities:	$123.6 million

Reg. Capital:	($4.7) million
RC/Liabs.:	(4.0%)

and
First Federated Savings Bank
North Palm Beach, FL
FHLBB No. 6823

Assets:	$142.7 million
Liabilities:	$180.9 million
Reg. Capital:	($38.2) million
RC/Liabs.:	(26.8%)

by
Statesman Group, Inc.
Des Moines, IA
Private Investor

Assets:	$1,192.1 million
Liabilities:	$1,131.2 million
Stockholders Equity:	$60.9 million
SE/Liabs.:	5.1%

(Association data as of 12/31/87)
(Statesman data as of 9/30/87)

EXECUTIVE SUMMARY

ISSUE

Whether the Board should approve the FSLIC-assisted acquisitions of First Federal SB, Waterloo, IA ("First"), Peoples FS&LA, Waterloo, IA ("Peoples"), Perpetual S&LA, Waterloo, IA ("Perpetual"), and First Federated, North Palm Beach, FL ("Federated") by the Statesman Group, Inc. ("Statesman").

BACKGROUND

First attempted to grow out of it's early 1980's loan difficulties by engaging in a policy of nationwide commercial lending. The association grew over 90 percent in 20 months, but the operations of First remained unprofitable. The association is currently carrying on the books numerous nonperforming commercial and acquisition, development and construction loans.

Peoples' difficulties are attributable to the high level of delinquent 1-4 family mortgages, real estate owned, and real estate in judgment. The economy in the Waterloo area is weak resulting in a high level of unemployment and a decrease in housing values. In addition, unreserved loan losses currently exceed $2.5 million.

Perpetual has agreed to establish a loan loss reserve of $2.7 million in connection with problem secondary mortgage loans purchased from the now defunct First American Mortgage Company. Furthermore, the association is located in a depressed area and scheduled items are quite high.

Federated's problems stem primarily from the manner in which the mortgage banking subsidiary was operated. The subsidiary's mortgage servicing portfolio was comprised largely of servicing rights on high coupon loans purchased at significant premiums. The prepayment of the underlying loans has resulted in significant writedowns of the abovementioned premiums. The association has also experienced management and lending difficulties.

TRANSACTION

The Statesman Group, Inc. ("Statesman") will issue $12.6 million in preferred stock to Statesman Savings Holding Company ("SSHC") which will be used as partial capitalization of SSHC. The other portion of the capitalization of SSHC will be cash of $8.4 million from American Life and Casualty Company in exchange for common stock. SSHC will in turn issue $12.6 million in preferred stock to the Statesman and pass $8.4 million in cash, $12.6 million in preferred stock, and $5 million in subordinated debentures through to Statesman Bank for Savings, SB ("SBS"). SBS will then purchase substantially all the assets and liabilities of First, Peoples, Perpetual, and Federated.

FORBEARANCES

It is proposed that the following forbearances be granted in connection with the acquisition:

1. Where scheduled items are referred to in the regulation, assets of First, Peoples, Perpetual, and Federated that are scheduled items or become classified assets shall be excluded for a period of five years following the acquisition from any computation which requires the inclusion of such assets.

2. For a period not to exceed five years following the acquisition, FSLIC will not exercise its authority under Section 563.13 for a failure to meet the regulatory capital requirements due to the acquired scheduled items.

3. For one year following the acquisition, liquidity penalties will not be assessed if the deficiency results from a liquidity deficiency existing at the time of the acquisition or from aggregate net withdrawals from the existing offices of First, Peoples, Perpetual, or Federated.

4. It is the FSLIC's intention that $21 million of the cash contribution to be made to SBS pursuant to an assistance agreement to be entered into between the FSLIC and SBS is to be a credit to SBS regulatory capital; therefore, for regulatory accounting purposes, SBS may book such contribution as a direct addition to its regulatory capital.

5. SBS shall be given a reasonable period of time, but not to exceed 3 years, to phase out, dispose of or discontinue in an orderly manner, any acquired investments, activities, or operations inconsistent with the Home Owners' Loan Act of 1933, as amended.

6. SBS shall not for a period not to exceed 3 years, be deemed in violation of any of the provisions of Section 545.74 (Service Corporations) for investments acquired as part of the merger.

7. The Bank Board shall forbear from taking action due to SBS' violations of the holding company regulations regarding the acceptance and holding of specified securities of its parent holding company. In addition, the Bank Board will forbear from taking any supervisory/enforcement action due to the institution's violation of the equity risk investment limitations due to its acceptance and holding of the specified securities of its parent holding company.

AFFILIATED TRANSACTIONS

The applicant has requested waivers for numerous affiliated transactions such as, the servicing of SBS' loans through Statesman's mortgage subsidiary, providing adjustable rate loans and a line of credit to the mortgage subsidiary, and allowing Statesman to borrow from the institution and provide management services to the same. The applicant has requested that SBS be allowed to purchase GNMA and other securities from Statesman's mortgage company.

To allow for such affiliated transactions this Office recommends several restrictions and guidelines:

1. Statesman and SBS must maintain documentation to justify the affiliated transactions and ensure that they are fair to and in the best interest of the institution.

2. The PSA may revoke any approved affiliated transactions that are judged not to be fair or in the best interest of the institution.

3. Affiliated transactions are to be limited to existing lines of business.

4. The institution shall submit in advance an annual report to the PSA indicating the actual types and volumes of affiliated transactions.

CROSS-MARKETING

Statesman has requested the ability to market a variety of insurance products through the institution's branches and to utilize Statesman's and SBS' customer bases for direct and personal solicitation. In addition, the applicant proposes to set up brokerage services within the branches and utilize the broker to trade for SBS' account.

ORPOS does not object to the cross-marketing as long as the purchasers of the insurance products are made aware that there is no link between the insurance products and FSLIC insurance. Furthermore, the products to be marketed will be restricted to existing products being offered by Statesman unless approved by the PSA.

DEBT APPROVAL

Pursuant to be applicant attaining non-diversified status, there will be a Proposed Debt Budget filed with the PSA by the applicant to cover any contemplated debt for a given fiscal year.

LOANS

Loans aggregating $30 million, a $20 million loan and a $10 million loan to the Employee Stock Ownership Plan which is guaranteed by Statesman, currently in affect with Bank One, can be place on SBS' books with the same rates, terms, restrictive covenants, and collateralization. A $17 million loan will also be allowed to cover payments to the Government National Mortgage Association for three months. At the end of the three months that loan will be reduced to $15 million for a period not to exceed 12 months in total duration.

RECOMMENDATIONS

The Supervisory Agent's recommendation as well as a more detailed history of the disappearing institutions is contained in the attached memorandum. This Office has no objection to the Supervisory Agent's recommendation for approval.

FEDERAL HOME LOAN BANK
BOARD MEETING
(Closed Session)

March 11th, 1988

M. DANNY WALL,
Chairman

ROGER MARTIN,
Board Member

LAWRENCE WHITE,
Board Member

REDACTED

MS. BROOKINGS: There's an additional exhibit that needs to be entered into the record. It's Exhibit I-4. It's the viability and revised proposal costing, the cost of the transaction, our net present value basis. (Inaudible)—has provided us with a range of $154 million to $157 million, depending on various scenarios. The cost of liquidations estimated to be $207 million for these four institutions; thereby, a proposal of approximately 75 percent of the cost of liquidation.

The proposal before the Board represents four previous liquidation candidates, which staff has successfully negotiated a transaction of approximately 75 percent of the cost of liquidation by working with an acquirer who had specialized interest. This brings new capital into the industry and provides a substantial upside to the FSLIC in order to return on our investment.

It's, therefore, the staff of the Federal Home Loan Bank in Atlanta, the Federal Home Loan Bank of Des Moines, the Office of Regulatory Policy Oversight and Supervision, the Office of General Counsel and FSLIC's recommendation that the Bank Board approve this transaction.

CHAIRMAN WALL: I would make the observation that this has been quite an undertaking, as has just been identified by virtue of all of the people who have been involved in the process, and that the process has involved as a result many different people from many of the different aspects of the system and, of course, four different institutions, which itself is no simple matter.

I recognize and want to acknowledge the fact that staff has put in just incredible hours and effort in this particular undertaking with confusions and with

problems of deadlines and such having occurred and/or having been revised, and perhaps having been revised again. I do want to acknowledge, commend and thank everybody who has been involved in the process.

I think this particular step as far as the Federal Home Loan Bank Board and the system is concerned is going to be seen as a significant one because there are many significant signs and signals being given by this action. So I think it's important that we will have disposed of it and put it out for public perusal, whether it be just from the standpoint of what FSLIC is doing or whether it be from the standpoint of those who have been looking at such possibilities from their own point of view in terms of their own investment opportunities.

It seems to me that it's important that in light of the pressure that the people have been under as we've approached this meeting today that if anyone in this process is concerned or has a significant question whether or not this is the appropriate package, I want to hear from that person or those people at this point. I don't want anyone to feel we have been pressuring in a precipitous way this decision. I think it's appropriate, and it's just

MERGER AGREEMENT
AND
PLAN OF MERGER

THIS MERGER AGREEMENT is made and entered into as of the 11th day of March, 1988, by and between FIRST FEDERAL SAVINGS BANK, Waterloo, Iowa ("MERGING ASSOCIATION"), and STATESMAN BANK FOR SAVINGS, FSB, Waterloo, Iowa ("SBS" or "RESULTING ASSOCIATION").

RECITALS

1. SBS has been organized and chartered as a federal stock savings bank pursuant to § 406(a), (b)(1)(A), (c)(1)(B) and (c)(3)(B) of the National Housing Act, as amended ("NHA"), 12 U.S.C. § 1729(a), (b)(1)(A), (c)(1)(B) and (c)(3)(B) (1982).

2. It is deemed to be in the best interests of the members of the MERGING ASSOCIATION and the sole stockholder of SBS that such institutions effect a merger upon the terms and conditions stated in this Agreement ("Merger").

3. It is believed that the Merger will enable SBS to establish and maintain savings, mortgage and other services.

4. The Merger is authorized by § 5 of the Home Owners' Loan Act of 1933, as amended ("HOLA"), 12 U.S.C. § 1464 (1982), and the rules and regulations promulgated under and pursuant to the HOLA and the NHA by the FEDERAL HOME LOAN BANK BOARD ("BANK BOARD").

5. The following agreement is entered into in consideration of the mutual promises contained in this Agreement.

AGREEMENT

§ 1 *Merger.* The MERGING ASSOCIATION shall merge with and into SBS.

§ 2 *RESULTING ASSOCIATION.* The RESULTING ASSOCIATION shall be STATEMAN BANK FOR SAVINGS, FSB, Waterloo, Iowa.

§ 3 *Name of the RESULTING ASSOCIATION.* The name of the RESULTING ASSOCIATION shall be STATESMAN BANK FOR SAVINGS, FSB.

§ 4 *Home Office of the RESULTING ASSOCIATION.* The home office of the RESULTING ASSOCIATION shall be located at Fourth and Mulberry, Waterloo, Iowa, the present home office of the MERGING ASSOCIATION.

§ 5 *Charter and Bylaws of the RESULTING ASSOCIATION.* After the Merger, the RESULTING ASSOCIATION shall operate under the charter and bylaws of SBS.

§ 6 *Directors of the RESULTING ASSOCIATION.* The number of directors of the RESULTING ASSOCIATION shall be 7. The names and addresses of those persons who shall serve as directors of the RESULTING ASSOCIATION and the expiration dates of their terms are listed on Exhibit A attached hereto, which constitutes a part of this Agreement.

§ 7 *Officers.* The existing officers of SBS shall be the officers of the RESULTING ASSOCIATION.

§ 8 *Branch Offices of the RESULTING ASSOCIATION.* After the Merger, the branch offices of the RESULTING ASSOCIATION shall include all the branch offices of the MERGING ASSOCIATION. The addresses of the offices that will be branch offices of the RESULTING ASSOCIATION are listed on Exhibit B attached hereto, which constitutes a part of this Agreement.

§ 9 *Accounts.* Upon the effective date of the Merger ("Effective Date"), each accountholder of the MERGING ASSOCIATION shall receive, without payment, a withdrawable account or accounts in the RESULTING ASSOCIATION equal in withdrawal value to the account or accounts held in the MERGING ASSOCIATION on such date, featuring the same rate, maturity and other terms, except that holders of such accounts shall not be members of the RESULTING ASSOCIATION, shall have no voting rights in the RESULTING ASSOCIATION and shall have no rights to participate in the equity of the RESULTING ASSOCIATION upon liquidation or otherwise.

§ 10 *Transfer of Assets and Liabilities upon Merger.* Upon the Effective Date, all of the assets and property of every kind or character, real, personal and mixed, tangible and intangible, choses in action, rights and credits, then owned by the MERGING ASSOCIATION, or that would inure to it, shall immediately by operation of law and without the necessity of any instrument of conveyance or transfer and without any further act or deed be vested in and become the property of the RESULTING ASSOCIATION, which shall have, hold, and enjoy the same in its own right as fully and to the same extent as the same were possessed, held and enjoyed by the MERGING ASSOCIATION prior to the Merger. The RESULTING ASSOCIATION shall be deemed to be and shall be a continuation of the entity and identity of SBS. All of the rights and obligations of the MERGING ASSOCIATION shall remain unimpaired, and the RESULTING ASSOCIATION shall, on the Effective Date, succeed to all of such rights and obligations and the duties connected with them.

§ 11 *Stock.* Upon the Effective Date, each share of SBS capital stock outstanding immediately prior to

such date shall remain outstanding as a share of the RESULTING ASSOCIATION's stock. Upon the Effective Date, all voting rights of borrowers or accountholders of the MERGING ASSOCIATION shall cease, and all voting rights in the RESULTING ASSOCIATION shall be vested in and exercisable by the sole stockholder of the RESULTING ASSOCIATION. No stock of the RESULTING ASSOCIATION shall be received or distributed in connection with the Merger.

§ 12 *Effective Date of Merger.* The transactions contemplated by this Agreement shall be effective only when approved by the BANK BOARD. The Effective Date of the Merger shall be a date determined by the BANK BOARD in accordance with its resolution approving the Merger.

§ 13 *Further Actions.* All of the transactions contemplated by this Agreement have been or will be authorized by all necessary corporate action of each institution. Both institutions by their proper officers shall execute and deliver all instruments, certificates and other documents as may be necessary or incidental to the performance of this Agreement.

§ 14 *Condition of the MERGING ASSOCIATION.* The RESULTING ASSOCIATION acknowledges that it is familiar with the present financial condition of the MERGING ASSOCIATION and of the deterioration of the assets, business and operations of the MERGING ASSOCIATION.

§ 15 *Counterparts, Modifications, Headings.*

(a) This Agreement may be executed in any number of counterparts, all of which taken together shall constitute one and the same instrument, and any party may execute this Agreement by signing any such counterpart.

(b) No amendment or modification of this Agreement shall be binding unless executed in writing by the parties or their successors.

(c) Section headings are not to be considered part of this Agreement, are solely for convenience of reference, and shall not affect the meaning or interpretation of this Agreement or any of its provisions.

§ 16 *Entire Agreement, Severability.*

(a) This Agreement, together with any interpretation or understanding agreed to in writing by the parties, constitutes the entire agreement between the parties pertaining to the subject matter hereof and supersedes all prior agreements and understandings of the parties in connection with it.

(b) If any provision of this Agreement is invalid or unenforceable, all of the remaining provisions of this Agreement shall remain in full force and effect and shall be binding upon the MERGING ASSOCIATION and the RESULTING ASSOCIATION.

§ 17 *Governing Law.* This Agreement and the rights and obligations under it shall be governed by the laws of the State of Iowa to the extent that federal law does not control. Nothing in this Agreement shall require any unlawful action or inaction by either party.

§ 18 *Sole Benefit.* Nothing expressed or referred to in this Agreement is intended or shall be construed to give any person other than the RESULTING ASSOCIATION or the MERGING ASSOCIATION any legal or equitable right, remedy, or claim under, or in respect to, this Agreement, it being the intention of the parties that this Agreement, the assumption of obligations and statements of responsibilities under it, and all of its conditions and

provisions are for the sole benefit of the RESULTING ASSOCIATION and the MERGING ASSOCIATION and for the benefit of no other person.

§ 19 *Acknowledgment.* Each party to this Agreement, by the execution of this Agreement, acknowledges and affirms that its board of directors has, by at least a two-thirds vote, approved this Agreement and the Merger, authorized the execution of this Agreement, empowered its signatories to execute this Agreement, and authorized the filing of this Agreement with the BANK BOARD.

§ 20 *Conditions.* This Agreement is conditioned upon the execution of an Assistance Agreement among the Federal Savings and Loan Insurance Corporation, the RESULTING ASSOCIATION, The Statesman Group, Inc., Des Moines, Iowa, American Life and Casualty Insurance Company, Fargo, North Dakota, and Statesman Savings Holding Corp., Des Moines, Iowa.

IN WITNESS WHEREOF, the parties have caused this agreement to be executed on their behalf by their duly authorized agents.

ATTESTED:	STATESMAN BANK FOR SAVING FSB
By: _____	By: _____
Its: _____	Its: _____
Date: _____	
ATTESTED:	FIRST FEDERAL SAVINGS BANK
By: _____	By: _____
Its: _____	Its: _____
Date: _____	

MERGER AGREEMENT
AND
PLAN OF MERGER

THIS MERGER AGREEMENT is made and entered into as of the 11th day of March, 1988, by and between PEOPLES FEDERAL SAVINGS AND LOAN ASSOCIATION, Waterloo, Iowa ("MERGING ASSOCIATION"), and STATESMAN BANK FOR SAVINGS, FSB, Waterloo, Iowa ("SBS" or "RESULTING ASSOCIATION").

RECITALS

1. SBS has been organized and chartered as a federal stock savings bank pursuant to § 406(a), (b)(1)(A), (c)(1)(B) and (c)(3)(B) of the National Housing Act, as amended ("NHA"), 12 U.S.C. § 1729(a), (b)(1)(A), (c)(1)(B) and (c)(3)(B) (1982).

2. It is deemed to be in the best interests of the members of the MERGING ASSOCIATION and the sole stockholder of SBS that such institutions effect a merger upon the terms and conditions stated in this Agreement ("Merger").

3. It is believed that the Merger will enable SBS to establish and maintain savings, mortgage and other services.

4. The Merger is authorized by § 5 of the Home Owners' Loan Act of 1933, as amended ("HOLA"), 12 U.S.C. § 1464 (1982), and the rules and regulations promulgated under and pursuant to the HOLA and the NHA by the FEDERAL HOME LOAN BANK BOARD ("BANK BOARD").

5. The following agreement is entered into in consideration of the mutual promises contained in this Agreement.

AGREEMENT

§ 1 *Merger.* The MERGING ASSOCIATION shall merge with and into SBS.

§ 2 *RESULTING ASSOCIATION.* The RESULTING ASSOCIATION shall be STATESMAN BANK FOR SAVINGS, FSB, Waterloo, Iowa.

§ 3 *Name of the RESULTING ASSOCIATION.* The name of the RESULTING ASSOCIATION shall be STATESMAN BANK FOR SAVINGS, FSB.

§ 4 *Home Office of the RESULTING ASSOCIATION.* The home office of the RESULTING ASSOCIATION shall be located at Fourth and Mulberry, Waterloo, Iowa. The present home office of the MERGING ASSOCIATION shall become a branch office of the RESULTING ASSOCIATION.

§ 5 *Charter and Bylaws of the RESULTING ASSOCIATION.* After the Merger, the RESULTING ASSOCIATION shall operate under the charter and bylaws of SBS.

§ 6 *Directors of the RESULTING ASSOCIATION.* The number of directors of the RESULTING ASSOCIATION shall be 7. The names and addresses of those persons who shall serve as directors of the RESULTING ASSOCIATION and the expiration dates of their terms are listed on Exhibit A attached hereto, which constitutes a part of this Agreement.

§ 7 *Officers.* The existing officers of SBS shall be the officers of the RESULTING ASSOCIATION.

§ 8 *Branch Offices of the RESULTING ASSOCIATION.* After the Merger, the branch offices of the RESULTING ASSOCIATION shall include the present home and branch offices of the MERGING ASSOCIATION. The addresses of the offices that will be branch offices of the RESULTING ASSOCIATION are listed on Exhibit B attached hereto, which constitutes a part of this Agreement.

§ 9 *Accounts.* Upon the effective date of the Merger ("Effective Date"), each accountholder of the MERGING ASSOCIATION shall receive, without payment, a withdrawable account or accounts in the RESULTING ASSOCIATION equal in withdrawal value to the account or accounts held in the MERGING ASSOCIATION on such date, featuring the same rate, maturity and other terms, except that holders of such accounts shall not be members of the RESULTING ASSOCIATION, shall have no voting rights in the RESULTING ASSOCIATION and shall have no rights to participate in the equity of the RESULTING ASSOCIATION upon liquidation or otherwise.

§ 10 *Transfer of Assets and Liabilities upon Merger.* Upon the Effective Date, all of the assets and property of every kind or character, real, personal and mixed, tangible and intangible, choses in action, rights and credits, then owned by the MERGING ASSOCIATION, or that would inure to it, shall immediately by operation of law and without the necessity of any instrument of conveyance or transfer and without any further act or deed be vested in and become the property of the RESULTING ASSOCIATION, which shall have, hold, and enjoy the same in its own right as fully and to the same extent as the same were possessed, held and enjoyed by the MERGING ASSOCIATION prior to the Merger. The RESULTING ASSOCIATION shall be deemed to be and shall be a continuation of the entity and identity of SBS. All of the rights and obligations of the MERGING ASSOCIATION shall remain unimpaired, and the RESULTING ASSOCIATION shall, on the Effective Date, succeed to all of such rights and obligations and the duties connected with them.

§ 11 *Stock.* Upon the Effective Date, each share of SBS capital stock outstanding immediately prior to

such date shall remain outstanding as a share of the RESULTING ASSOCIATION's stock. Upon the Effective Date, all voting rights of borrowers or accountholders of the MERGING ASSOCIATION shall cease, and all voting rights in the RESULTING ASSOCIATION shall be vested in and exercisable by the sole stockholder of the RESULTING ASSOCIATION. No stock of the RESULTING ASSOCIATION shall be received or distributed in connection with the Merger.

§ 12 *Effective Date of Merger.* The transactions contemplated by this Agreement shall be effective only when approved by the BANK BOARD. The Effective Date of the Merger shall be a date determined by the BANK BOARD in accordance with its resolution approving the Merger.

§ 13 *Further Actions.* All of the transactions contemplated by this Agreement have been or will be authorized by all necessary corporate action of each institution. Both institutions by their proper officers shall execute and deliver all instruments, certificates and other documents as may be necessary or incidental to the performance of this Agreement.

§ 14 *Condition of the MERGING ASSOCIATION.* The RESULTING ASSOCIATION acknowledges that it is familiar with the present financial condition of the MERGING ASSOCIATION and of the deterioration of the assets, business and operations of the MERGING ASSOCIATION.

§ 15 *Counterparts, Modifications, Headings.*

(a) This Agreement may be executed in any number of counterparts, all of which taken together shall constitute one and the same instrument, and any party may execute this Agreement by signing any such counterpart.

(b) No amendment or modification of this Agreement shall be binding unless executed in writing by the parties or their successors.

(c) Section headings are not to be considered part of this Agreement, are solely for convenience of reference, and shall not affect the meaning or interpretation of this Agreement or any of its provisions.

§ 16 *Entire Agreement, Severability.*

(a) This Agreement, together with any interpretation or understanding agreed to in writing by the parties, constitutes the entire agreement between the parties pertaining to the subject matter hereof and supersedes all prior agreements and understandings of the parties in connection with it.

(b) If any provision of this Agreement is invalid or unenforceable, all of the remaining provisions of this Agreement shall remain in full force and effect and shall be binding upon the MERGING ASSOCIATION and the RESULTING ASSOCIATION.

§ 17 *Governing Law.* This Agreement and the rights and obligations under it shall be governed by the laws of the State of Iowa to the extent that federal law does not control. Nothing in this Agreement shall require any unlawful action or inaction by either party.

§ 18 *Sole Benefit.* Nothing expressed or referred to in this Agreement is intended or shall be construed to give any person other than the RESULTING ASSOCIATION or the MERGING ASSOCIATION any legal or equitable right, remedy, or claim under, or in respect to, this Agreement, it being the intention of the parties that this Agreement, the assumption of obligations and statements of responsibilities under it, and all of its conditions and

provisions are for the sole benefit of the RESULTING ASSOCIATION and the MERGING ASSOCIATION and for the benefit of no other person.

§ 19 *Acknowledgment.* Each party to this Agreement, by the execution of this Agreement, acknowledges and affirms that its board of directors has, by at least a two-thirds vote, approved this Agreement and the Merger, authorized the execution of this Agreement, empowered its signatories to execute this Agreement, and authorized the filing of this Agreement with the BANK BOARD.

§ 20 *Conditions.* This Agreement is conditioned upon the execution of an Assistance Agreement among the Federal Savings and Loan Insurance Corporation, the RESULTING ASSOCIATION, The Statesman Group, Inc., Des Moines, Iowa, American Life and Casualty Insurance Company, Fargo, North Dakota, and Statesman Savings Holding Corp., Des Moines, Iowa.

IN WITNESS WHEREOF, the parties have caused this agreement to be executed on their behalf by their duly authorized agents.

ATTESTED:	STATESMAN BANK FOR SAVING FSB
By: _____	By: _____
Its: _____	Its: _____
Date: _____	
ATTESTED:	PEOPLES FEDERAL SAVINGS AND LOAN ASSOCIATION
By: _____	By: _____
Its: _____	Its: _____
Date: _____	

MERGER AGREEMENT
AND
PLAN OF MERGER

THIS MERGER AGREEMENT is made and entered into as of the 11th day of March, 1988, by and between THE PERPETUAL SAVINGS AND LOAN ASSOCIATION, Waterloo, Iowa ("MERGING ASSOCIATION"), and STATESMAN BANK FOR SAVINGS, FSB, Des Moines, Iowa ("SBS" or "RESULTING ASSOCIATION").

RECITALS

1. SBS has been organized and chartered as a federal stock savings bank pursuant to § 406(a), (b)(1)(A), (c)(1)(B) and (c)(3)(B) of the National Housing Act, as amended ("NHA"), 12 U.S.C. § 1729(a), (b)(1)(A), (c)(1)(B) and (c)(3)(B) (1982).

2. It is deemed to be in the best interests of the members of the MERGING ASSOCIATION and the sole stockholder of SBS that such institutions effect a merger upon the terms and conditions stated in this Agreement ("Merger").

3. It is believed that the Merger will enable SBS to establish and maintain savings, mortgage and other services.

4. The Merger is authorized by § 5 of the Home Owners' Loan Act of 1933, as amended ("HOLA"), 12 U.S.C. § 1464 (1982), and the rules and regulations promulgated under and pursuant to the HOLA and the NHA by the FEDERAL HOME LOAN BANK BOARD ("BANK BOARD").

5. The following agreement is entered into in consideration of the mutual promises contained in this Agreement.

AGREEMENT

§ 1 *Merger.* The MERGING ASSOCIATION shall merge with and into SBS.

§ 2 *RESULTING ASSOCIATION.* The RESULTING ASSOCIATION shall be STATESMAN BANK FOR SAVINGS, FSB, Des Moines, Iowa.

§ 3 *Name of the RESULTING ASSOCIATION.* The name of the RESULTING ASSOCIATION shall be STATESMAN BANK FOR SAVINGS, FSB.

§ 4 *Home Office of the RESULTING ASSOCIATION.* The home office of the RESULTING ASSOCIATION shall be located at Fourth and Mulberry, Waterloo, Iowa. The present home office of the MERGING ASSOCIATION shall become a branch office of the RESULTING ASSOCIATION.

§ 5 *Charter and Bylaws of the RESULTING ASSOCIATION.* After the Merger, the RESULTING ASSOCIATION shall operate under the charter and bylaws of SBS.

§ 6 *Directors of the RESULTING ASSOCIATION.* The number of directors of the RESULTING ASSOCIATION shall be 7. The names and addresses of those persons who shall serve as directors of the RESULTING ASSOCIATION and the expiration dates of their terms are listed on Exhibit A attached hereto, which constitutes a part of this Agreement.

§ 7 *Officers.* The existing officers of SBS shall be the officers of the RESULTING ASSOCIATION.

§ 8 *Branch Offices of the RESULTING ASSOCIATION.* After the Merger, the branch offices of the RESULTING ASSOCIATION shall include the present home and branch offices of the MERGING ASSOCIATION. The addresses of the offices that will be branch offices of the RESULTING ASSOCIATION are listed on Exhibit B attached hereto, which constitutes a part of this Agreement.

§ 9 *Accounts.* Upon the effective date of the Merger ("Effective Date"), each accountholder of the MERGING ASSOCIATION shall receive, without payment, a withdrawable account or accounts in the RESULTING ASSOCIATION equal in withdrawal value to the account or accounts held in the MERGING ASSOCIATION on such date, featuring the same rate, maturity and other terms, except that holders of such accounts shall not be members of the RESULTING ASSOCIATION, shall have no voting rights in the RESULTING ASSOCIATION and shall have no rights to participate in the equity of the RESULTING ASSOCIATION upon liquidation or otherwise.

§ 10 *Transfer of Assets and Liabilities upon Merger.* Upon the Effective Date, all of the assets and property of every kind or character, real, personal and mixed, tangible and intangible, choses in action, rights and credits, then owned by the MERGING ASSOCIATION, or that would inure to it, shall immediately by operation of law and without the necessity of any instrument of conveyance or transfer and without any further act or deed be vested in and become the property of the RESULTING ASSOCIATION, which shall have, hold, and enjoy the same in its own right as fully and to the same extent as the same were possessed, held and enjoyed by the MERGING ASSOCIATION prior to the Merger. The RESULTING ASSOCIATION shall be deemed to be and shall be a continuation of the entity and identity of SBS. All of the rights and obligations of the MERGING ASSOCIATION shall remain unimpaired, and the RESULTING ASSOCIATION shall, on the Effective Date, succeed to all of such rights and obligations and the duties connected with them.

§ 11 *Stock.* Upon the Effective Date, each share of SBS capital stock outstanding immediately prior to

such date shall remain outstanding as a share of the RESULTING ASSOCIATION's stock. Upon the Effective Date, all voting rights of borrowers or accountholders of the MERGING ASSOCIATION shall cease, and all voting rights in the RESULTING ASSOCIATION shall be vested in and exercisable by the sole stockholder of the RESULTING ASSOCIATION. No stock of the RESULTING ASSOCIATION shall be received or distributed in connection with the Merger.

§ 12 *Effective Date of Merger.* The transactions contemplated by this Agreement shall be effective only when approved by the BANK BOARD and the Superintendent of Savings and Loans, State of Iowa. The Effective Date of the Merger shall be a date determined by the BANK BOARD in accordance with its resolution approving the Merger.

§ 13 *Further Actions.* All of the transactions contemplated by this Agreement have been or will be authorized by all necessary corporate action of each institution. Both institutions by their proper officers shall execute and deliver all instruments, certificates and other documents as may be necessary or incidental to the performance of this Agreement.

§ 14 *Condition of the MERGING ASSOCIATION.* The RESULTING ASSOCIATION acknowledges that it is familiar with the present financial condition of the MERGING ASSOCIATION and of the deterioration of the assets, business and operations of the MERGING ASSOCIATION.

§ 15 *Counterparts, Modifications, Headings.*

(a) This Agreement may be executed in any number of counterparts, all of which taken together shall constitute one and the same instrument, and any party may execute this Agreement by signing any such counterpart.

(b) No amendment or modification of this Agreement shall be binding unless executed in writing by the parties or their successors.

(c) Section headings are not to be considered part of this Agreement, are solely for convenience of reference, and shall not affect the meaning or interpretation of this Agreement or any of its provisions.

§ 16 *Entire Agreement, Severability.*

(a) This Agreement, together with any interpretation or understanding agreed to in writing by the parties, constitutes the entire agreement between the parties pertaining to the subject matter hereof and supersedes all prior agreements and understandings of the parties in connection with it.

(b) If any provision of this Agreement is invalid or unenforceable, all of the remaining provisions of this Agreement shall remain in full force and effect and shall be binding upon the MERGING ASSOCIATION and the RESULTING ASSOCIATION.

§ 17 *Governing Law.* This Agreement and the rights and obligations under it shall be governed by the laws of the State of Iowa to the extent that federal law does not control. Nothing in this Agreement shall require any unlawful action or inaction by either party.

§ 18 *Sole Benefit.* Nothing expressed or referred to in this Agreement is intended or shall be construed to give any person other than the RESULTING ASSOCIATION or the MERGING ASSOCIATION any legal or equitable right, remedy, or claim under, or in respect to, this Agreement, it being the intention of the parties that this Agreement, the assumption of obligations and statements of responsibilities under it, and all of its conditions and

provisions are for the sole benefit of the RESULTING ASSOCIATION and the MERGING ASSOCIATION and for the benefit of no other person.

§ 19 *Acknowledgment.* Each party to this Agreement, by the execution of this Agreement, acknowledges and affirms that its board of directors has, by at least a two-thirds vote, approved this Agreement and the Merger, authorized the execution of this Agreement, empowered its signatories to execute this Agreement, and authorized the filing of this Agreement with the BANK BOARD.

§ 20 *Conditions.* This Agreement is conditioned upon the execution of an Assistance Agreement among the Federal Savings and Loan Insurance Corporation, the RESULTING ASSOCIATION, The Statesman Group, Inc., Des Moines, Iowa, American Life and Casualty Insurance Company, Fargo, North Dakota, and Statesman Savings Holding Corp., Des Moines, Iowa.

IN WITNESS WHEREOF, the parties have caused this agreement to be executed on their behalf by their duly authorized agents.

ATTESTED:	STATESMAN BANK FOR SAVING FSB
By: _____	By: _____
Its: _____	Its: _____
Date: _____	
ATTESTED:	PERPETUAL SAVINGS AND LOAN ASSOCIATION, by the Federal Savings and Loan Insurance Corporation as Conservator
By: _____	By: _____
Its: _____	Its: Special Representative
Date: _____	

ACQUISITION AGREEMENT BETWEEN THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

AS RECEIVER FOR
FIRST FEDERATED SAVINGS BANK
WEST PALM BEACH, FLORIDA

AND

STATESMAN BANK FOR SAVINGS, FSB
WATERLOO, IOWA

Dated: March 11, 1988

TABLE OF CONTENTS

ACQUISITION AGREEMENT BETWEEN
THE FEDERAL SAVINGS AND
LOAN INSURANCE CORPORATION
AS RECEIVER FOR
FIRST FEDERATED SAVINGS BANK
WEST PALM BEACH, FLORIDA

AND

STATESMAN BANK FOR SAVINGS, FSB
WATERLOO, IOWA

Page

Recitals..... 1
§ 1 Purchase of Assets..... 2
§ 2 Assumption of Liabilities..... 3
§ 3 Records..... 4
§ 4 Inventory..... 5
§ 5 Purchase Price..... 5
§ 6 Duties with Respect to Savers..... 6
§ 7 Office Space for the RECEIVER..... 7
§ 8 Litigation; Power of Attorney..... 8
§ 9 Rights and Forbearance..... 8
§ 10 Sole Benefit..... 8
§ 11 Successors and Assigns..... 9
§ 12 Notices..... 9
§ 13 Accounting Principles..... 9
§ 14 Governing Law..... 10
§ 15 Effective Date..... 11
§ 16 Entire Agreement; Severability..... 11
§ 17 Counterparts; Modification; Headings..... 11
§ 18 Warranties..... 12
§ 19 Continuing Cooperation..... 12
Signature Page..... 13

ACQUISITION AGREEMENT

THIS AGREEMENT is made and entered into this 11th day of March, 1988, by and between the FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, in its capacity as Receiver for FIRST FEDERATED SAVINGS BANK, West Palm Beach, Florida (respectively, "RECEIVER" and "CLOSED ASSOCIATION"), and STATESMAN BANK FOR SAVINGS, FSB, Waterloo, Iowa ("ACQUIRING ASSOCIATION").

RECITALS

A. The CLOSED ASSOCIATION is a stock savings bank organized under the laws of the State of Florida, the accounts of which are insured by the FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION in its capacity as a corporate instrumentality of the United States ("CORPORATION").

B. The FEDERAL HOME LOAN BANK BOARD ("BANK BOARD"), by its Resolution No. 88, dated March 11, 1988, duly appointed the CORPORATION as RECEIVER for the CLOSED ASSOCIATION, and the RECEIVER's appointment has become effective.

C. The RECEIVER has taken possession of the CLOSED ASSOCIATION and by operation of law has succeeded to all the rights, titles, powers, and privileges of the CLOSED ASSOCIATION.

D. The ACQUIRING ASSOCIATION is a stock savings bank organized under the laws of the United States, the accounts of which are insured by the CORPORATION.

E. It has been mutually agreed between the ACQUIRING ASSOCIATION and the RECEIVER,

and the BANK BOARD has determined that it is in the best interests of the CLOSED ASSOCIATION, its savers, and the CORPORATION, that substantially all of the CLOSED ASSOCIATION's assets, all of its deposits or withdrawable accounts, and substantially all of its other liabilities be immediately transferred to and assumed by the ACQUIRING ASSOCIATION, as provided in this Agreement.

F. In consideration of the foregoing and of the mutual covenants and agreements contained herein, the RECEIVER and the ACQUIRING ASSOCIATION enter into the following agreement.

AGREEMENT

§ 1 *Purchase of Assets.* The RECEIVER hereby sells to the ACQUIRING ASSOCIATION, and the ACQUIRING ASSOCIATION hereby purchases from the RECEIVER, all of the RECEIVER's right, title, and interest in and to all of the CLOSED ASSOCIATION's assets that the RECEIVER owns or holds and any of the CLOSED ASSOCIATION's assets hereafter acquired by the RECEIVER, excluding, however: (a) any known or unknown claim, demand, cause of action, or judgment (i) against the CLOSED ASSOCIATION's or any of its subsidiaries' present or former employees, agents, or controlling persons, directors, officers, or other persons, directly or indirectly exercising a controlling influence over the management or policies of the CLOSED ASSOCIATION or any of its subsidiaries, (ii) against any stockholder of the CLOSED ASSOCIATION, (iii) against any appraiser, accountant, auditor, attorney, investment banker or broker, loan broker, deposit broker, securities dealer, or other professional individual or entity performing services for the CLOSED

ASSOCIATION, and (iv) against any administrator, executor, personal representative, heir, assign, director or officer of any person or entity identified in § 1(a)(i), (ii) or (iii), arising out of any act(s) or omission(s) of such person or entity prior to the effective date with respect to the CLOSED ASSOCIATION or its property, or any of its subsidiaries or the subsidiaries' property; (b) any known or unknown claim, demand, cause of action or judgment against a surety for any person or entity identified in § 1(a)(i), (ii), (iii) or (iv), including any insurer who may be liable for indemnification for the loss caused by the action or inaction of any such person or entity; (c) any claim against counsel for the CLOSED ASSOCIATION for recovery of sums paid by the CLOSED ASSOCIATION to challenge the receivership or contemporary or subsequent actions of the BANK BOARD or the CORPORATION; and (d) such limited items, parts, or portions of the CLOSED ASSOCIATION's books and records as are specifically identified by the RECEIVER, *provided* that the ACQUIRING ASSOCIATION consents to the RECEIVER's retention of such records (the "excluded papers").

§ 2 *Assumption of Liabilities.* The ACQUIRING ASSOCIATION hereby expressly assumes and agrees to pay, perform, and discharge all of the CLOSED ASSOCIATION's liabilities, including, but not limited to, those shown on the CLOSED ASSOCIATION's books and records at such time as the RECEIVER takes possession of the CLOSED ASSOCIATION, but excluding, however, obligations under any compensation or employment contract between the CLOSED ASSOCIATION and any of its employees, officers, or directors, other than obligations to honor or satisfy and right already vested under such contracts. The term "liability" as used in

this section does not refer to any obligation of the CLOSED ASSOCIATION to its stockholders arising out of or related in any way to their stock holdings (including claims for damages or rescission arising from the purchase or sale of such stock holdings) or any obligation to indemnify controlling persons, directors, officers or other persons as a result of suits arising from claims described in § 1, and the ACQUIRING ASSOCIATION specifically does not assume by virtue of this Agreement any such obligations to the stockholders or for indemnification of the controlling persons, directors, officers or other persons. For the purposes of this Agreement, "stockholder" means a holder of stock; and "stock" includes a nonwithdrawable account, as defined by 12 C.F.R. § 561.42 (1987), stock, permanent stock, guarantee stock, common stock, preferred stock, and subordinated debt issued by the CLOSED ASSOCIATION.

§ 3 *Records.*

(a) The ACQUIRING ASSOCIATION acknowledges that the RECEIVER is delivering to it, among the assets sold and purchased under § 1 of this Agreement, all of the CLOSED ASSOCIATION's books and records, except the excluded papers, if any.

(b) The ACQUIRING ASSOCIATION agrees to preserve and keep safe all of the CLOSED ASSOCIATION's books and records that it acquires pursuant to this Agreement, to permit the RECEIVER at any reasonable time to inspect, make extracts from or copies of any of such books and records, and to cooperate fully with the RECEIVER in the preparation of the inventory described below.

(c) As a condition of this Agreement, the ACQUIRING ASSOCIATION agrees, at its own expense, either to segregate and keep separate or, in the alternative and at the option of the ACQUIRING

ASSOCIATION, to reconstruct, as of the date of this Agreement, the CLOSED ASSOCIATION's books and records transferred to it until the period in which the CLOSED ASSOCIATION may file an action for removal of the RECEIVER pursuant to law has expired, or, if such action is filed, until the dismissal of such action or the issuance of an order determining an appeal from any order of a court directing the removal of the RECEIVER.

§ 4 *Inventory.* As soon as is practicable after the effective date of this Agreement, the RECEIVER shall make, or cause to be made, an inventory of the CLOSED ASSOCIATION's assets and a record of its liabilities, as directed by the BANK BOARD. The RECEIVER shall furnish a copy of the inventory of the CLOSED ASSOCIATION's assets and record of its liabilities to the ACQUIRING ASSOCIATION upon their completion.

§ 5 *Purchase Price.* The purchase price of all assets sold to the ACQUIRING ASSOCIATION pursuant to § 1 shall be the assumption of liabilities provided for in § 2.

§ 6 *Duties With Respect to Savers.*

(a) The ACQUIRING ASSOCIATION agrees to pay, in accordance with the provisions of applicable law and the individual contracts governing the CLOSED ASSOCIATION's deposits or withdrawable accounts, all properly drawn and presented withdrawal requests by the CLOSED ASSOCIATION's depositors or withdrawable accountholders whose deposits or accounts are assumed by the ACQUIRING ASSOCIATION pursuant to § 2 of this Agreement, to the extent that such deposits or withdrawable account balances are sufficient to permit such payments and in compliance with the contractual terms of such deposits and accounts, and in all other

respects to discharge, in the usual course of business, the CLOSED ASSOCIATION's duties and obligations with respect to its depositors or accountholders, *provided,* however, that the ACQUIRING ASSOCIATION does not assume any special or unusual duties of the CLOSED ASSOCIATION to such depositors or accountholders unless the terms of such duties are disclosed in the CLOSED ASSOCIATION's records. Further, in accordance with applicable law and the individual contracts governing such deposits or accounts, the ACQUIRING ASSOCIATION agrees to pay interest on all of the CLOSED ASSOCIATION's deposits and withdrawable accounts that are assumed pursuant to § 2 of this Agreement.

(b) If any such depositors or withdrawable accountholders decline to accept the obligation of the ACQUIRING ASSOCIATION to pay the CLOSED ASSOCIATION's deposit or account liabilities assumed pursuant to § 2 of this Agreement and asserts a claim against the RECEIVER for any part of such assumed deposit liabilities, the ACQUIRING ASSOCIATION shall provide the RECEIVER, upon demand, with an amount of money sufficient to enable it to pay the claims of such depositors or accountholders, less any applicable early withdrawal penalties, not exceeding the amount credited to such persons on the ACQUIRING ASSOCIATION's records at the time such demand is made, and, upon paying the RECEIVER as so demanded, the ACQUIRING ASSOCIATION shall be discharged from any further liability for such claim under this Agreement.

(c) The ACQUIRING ASSOCIATION shall given written notice, in a form approved by the RECEIVER or its counsel, to the CLOSED ASSOCIATION's depositors and withdrawable accountholders

whose deposits or accounts are assumed by the ACQUIRING ASSOCIATION pursuant to § 2 of this Agreement of its assumption of liability for such deposits or accounts.

§ 7 *Office Space for the RECEIVER.* The ACQUIRING ASSOCIATION agrees to provide the RECEIVER, without charge and, if its duties so require, for a period of one year from the date of this Agreement, adequate space, including vault space and furnishings, for the RECEIVER's use in connection with the transfers and transactions required by this Agreement and with the exercise and discharge of its powers and duties as receiver of the CLOSED ASSOCIATION. After such period, the ACQUIRING ASSOCIATION shall continue to provide to the RECEIVER, at a reasonable rental to be agreed upon by the parties, such space and furnishings for such period as the RECEIVER may request.

§ 8 *Litigation; Power of Attorney.* In the event that any action at law or in equity in which the RECEIVER has an interest is instituted by any person against the CLOSED ASSOCIATION, the ACQUIRING ASSOCIATION, or both of them, or against the RECEIVER and either or both of the foregoing as co-defendants, or in which action the RECEIVER joins or is joined as co-defendant, the ACQUIRING ASSOCIATION agrees to file, or to join with the RECEIVER in filing, a petition to remove the action to an appropriate court, and hereby authorizes and appoints, as its attorney for the purpose of effecting such removal, any attorney designated or approved by the RECEIVER to act in that capacity.

§ 9 *Rights and Forbearance.* The rights, powers, and remedies given to the parties by this Agreement shall be in addition to all rights, powers, and remedies

given by any applicable statute or rule of law. Any forbearance, failure, or delay by either party in exercising or partially exercising any right, power, or remedy shall not preclude the further exercise of such right, power, or remedy.

§ 10 *Sole Benefit.* It is the intention of the parties that this Agreement, the assumption of obligations and statements of responsibilities under it, and all conditions and provisions of it, are for the sole benefit of the RECEIVER and the ACQUIRING ASSOCIATION and for the benefit of no other person. Nothing expressed or referred to in this Agreement is intended to or shall be construed to give any person other than the RECEIVER or the ACQUIRING ASSOCIATION any legal or equitable right, remedy, or claim under or with respect to this Agreement or any of its provisions.

§ 11 *Successors and Assigns.* All the terms and provisions of this Agreement shall be binding upon and inure to the benefit of the parties, their respective transferees, successors, and assigns, but this Agreement may not be assigned nor may any rights under it be transferred to or vested in any other party, through merger, consolidation, or otherwise, without the prior written consent of the CORPORATION.

§ 12 *Notices.* Any notice, request, demand, or other communication to either of the parties shall be deemed given when received and shall be given in writing and delivered in person or sent by first class mail in a prepaid envelope to such party at its address set forth below or at such other address as such party shall hereafter furnish in writing:

Statesman Bank for Savings, FSB
Fourth and Mulberry
Waterloo, Iowa 50704
Attn: President

FEDERAL SAVINGS AND LOAN
INSURANCE CORPORATION
As Receiver for First Federated Savings Bank
1700 G Street, N.W.
Washington, D.C. 20552
Attn: Special Representative

§ 13 *Accounting Principles.* Except as otherwise provided in this Agreement, any computations made for the purposes of this Agreement shall be governed by generally accepted accounting principles as applied in the savings and loan industry, except that where such principles conflict with the terms of this Agreement, any assistance agreement or agreements to which the ACQUIRING ASSOCIATION and the CORPORATION are parties, including, but not limited to, an agreement to make a contribution or loan, an agreement to purchase subordinated debt, or an agreement to issue and purchase Income Capital Certificates, applicable regulations of the BANK BOARD or the CORPORATION, or any resolution or action of the BANK BOARD or CORPORATION approving, or adopted concurrently with, this Agreement, then this Agreement, such assistance agreement, such regulations, and such resolutions or actions shall govern. In the case of any ambiguity in the interpretation or construction of any provision of this Agreement, such ambiguity shall be resolved in a manner consistent with such assistance agreement, such regulations, and the BANK BOARD's or the CORPORATION's resolutions or actions. If there is a conflict between this Agreement and such assistance

agreement or such regulations or reslutions or actions, then such assistance agreement or such regulations or resolutions or actions shall govern.

§ 14 *Governing Law.* To the extent that federal law does not control, this Agreement and the rights and obligations under it shall be governed by the law of the State of Iowa. Nothing in this Agreement shall require any unlawful action or inaction by either party.

§ 15 *Effective Date.* This Agreement, and the transfer of the CLOSED ASSOCIATION's assets and liabilities provided for by this Agreement, shall become effective upon its execution by the parties.

§ 16 *Entire Agreement; Severability.*

(a) This Agreement, together with any interpretation of it or any understanding agreed to in writing by the parties, constitutes the entire agreement between the ACQUIRING ASSOCIATION and the CORPORATION as RECEIVER, but not in its corporate capacity, in connection with the transactions contemplated by this Agreement, and supersedes all prior agreements and understandings of the parties, excepting only any resolutions or letters approved or adopted contemporaneously with this Agreement by the BANK BOARD or the CORPORATION.

(b) If any provision of this Agreement is invalid or unenforceable, then, to the extent possible, all of the remaining provisions of this Agreement shall remain in full force and effect and shall be binding upon the parties.

§ 17 *Counterparts; Modification; Headings.*

(a) This Agreement may be executed in any number of counterparts, each of which shall be an original but all of which shall together constitute one and the same instrument, and either party may

execute this Agreement by signing any such counterpart.

(b) No modification of this Agreement shall be binding unless executed in writing and signed by the parties or their successors.

(c) Section headings are not to be considered part of this Agreement, are solely for convenience of reference, and shall not affect the meaning or interpretation of this Agreement or any of its provisions.

§ 18 *Warranties.*

(a) The RECEIVER warrants and represents that it has authority to enter into this Agreement and that, as RECEIVER, it has full power and authority to transfer the CLOSED ASSOCIATION's assets and liabilities as provided by this Agreement.

(b) The ACQUIRING ASSOCIATION warrants and represents that all of the transactions contemplated by this Agreement have been or will be authorized by all necessary corporate actions and that it, by its proper officers or agents, has executed this Agreement and shall execute and deliver all instruments, certificates, and other documents that may be necessary or incidental to the performance of this Agreement.

(c) These warranties shall survive the execution, performance, and termination of this Agreement.

§ 19 *Continuing Cooperation.* The RECEIVER agrees, upon the request of the ACQUIRING ASSOCIATION, to execute and deliver such further instruments and documents of conveyance as shall be necessary or proper to vest in the ACQUIRING ASSOCIATION the RECEIVER's full legal or equitable title to the property transferred to the ACQUIRING ASSOCIATION pursuant to this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement by their duly authorized officers or agents.

Attest: Date: March 1, 1988	FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION AS RECEIVER FOR FIRST FEDERATED SAVINGS BANK
By: _____	By: _____
Attest:	STATESMAN BANK FOR SAVINGS, FSB
Date: March 11, 1988	
By: _____	By: _____
Its: _____	Its: _____

ASSISTANCE AGREEMENT
AMONG
THE FEDERAL SAVINGS AND LOAN
INSURANCE CORPORATION,

THE STATESMAN GROUP, INC.
Des Moines, Iowa,

AMERICAN LIFE AND CASUALTY
INSURANCE COMPANY
Fargo, North Dakota,

STATESMAN SAVINGS HOLDING CORP.
Des Moines, Iowa

AND

STATESMAN BANK FOR SAVINGS, FSB
Waterloo, Iowa

DATED March 11, 1988

SUMMARY OF SUBSTANTIVE PROVISIONS

Assistance Provided	Section in Agreement
1. Initial contribution by the FSLIC	§ 6(a)
2. Losses on Covered Assets	§ 3
3. Yield subsidy	§ 3
6. Indemnification for Undisclosed Liabilities, Unreserved for Claims, and Challenges to the Acquisition and the Mergers	§ 7

ASSISTANCE AGREEMENT
AMONG
THE FEDERAL SAVINGS AND
LOAN INSURANCE CORPORATION,

THE STATESMAN GROUP, INC.
Des Moines, Iowa,

AMERICAN LIFE AND CASUALTY
INSURANCE COMPANY
Fargo, North Dakota,

STATESMAN SAVINGS HOLDING CORP.
Des Moines, Iowa

AND

STATESMAN BANK FOR SAVINGS, FSB
Waterloo, Iowa

Date March 11, 1988

TABLE OF CONTENTS

		Page
	Recitals	1
§ 1	Definitions	5
	(a) "Acquired Association Claim"	5
	(b) "Affiliate"	7
	(c) "Appraised Equity Capital"	7
	(d) "Bank"	7
	(e) "Bank Board"	7
	(f) "Book Value"	7
	(g) "Claim"	11
	(h) "Covered Asset"	11
	(i) "Covered Asset Loss"	14
	(j) "Covered Asset Recovery"	14

	(k) "Credit" or "Credit Item"	14
	(l) "Debit" or "Debit Item"	14
	(m) "Effective Date"	14
	(n) "Federal Regulations"	15
	(o) "Federated Financial Loans"	15
	(p) "Foreclosure"	15
	(q) "GAAP"	15
	(r) "Initial Audit"	16
	(s) "Insurance Regulations"	16
	(t) "Liquidation"	16
	(u) "Negative Regulatory Capital"	16
	(v) "Net Proceeds Received"	17
	(w) "Note"	18
	(x) "Participation Interest"	18
	(y) "Quarter"	19
	(z) "Real Estate Held for Investment"	19
	(aa) "Real Estate in Judgment"	19
	(bb) "Real Estate Owned" or "REO"	19
	(cc) "Regulatory Capital Maintenance Agreement"	19
	(dd) "Reimbursable"	20
	(ee) "Related Claim"	20
	(ff) "Special Reserve Account"	20
	(gg) "Termination Date"	21
§ 2	Conditions	21
§ 3	Special Reserve Account	25
	(a) Debits	25
	(1) Covered Asset Losses	26
	(2) Appraisal Costs	26
	(3) Indemnification	26
	(4) Claim Expenses	26
	(5) Covered Asset Purchase	27
	(6) Payment of Credits	27
	(7) Expenses to Cure	27
	(8) Assignment of Related Claim and Acquired Association Claim and Excess Recoveries	27

(9) Uncollected Interest 27
(10) Yield Subsidy 28
(11) Recoveries on Purchased Covered Assets 31
(12) Federated Financial Loan Losses 31
(13) Lease Losses 32
(14) Tax Benefit Adjustment Payments 33
(b) Exclusions From Debits 33
(c) Credits to Special Reserve Account 34
(1) Covered Asset Recoveries 35
(2) Refunds 35
(3) Pre-Effective Date Interest 35
(4) Other Recoveries on Covered Assets 35
(5) Offset Gains 35
(6) Tax Refunds 36
(7) Audit Expense 36
(8) Excess Yield 37
(9) Uncollected Interest 37
(10) Recoveries on Acquired Association Claims and Related Claims 37
(11) CORPORATION'S Contribution 37
(12) Federal Financial Loan Recoveries 37
(13) Tax Benefits 38
(14) Income Payment Credits 40
§ 4 Write-Down of a Covered Asset 41
(a) Approval of a Write-Down 41
(b) Determination of Write-Down 41
(c) Required Sale 42
(d) Adjustments at Termination 43
§ 5 Initial Audit and Inventory 44
§ 6 Payments and Contributions 45
(a) Initial Contributions by the CORPORATION 45

(1) Cash Contribution 45
(2) Promissory Note 46
(b) Debit Balance 47
(c) Contributions Resulting From Assignment of Claims 47
(d) Income Payments 48
(e) Issuance of Subordinated Debenture 49
(f) Reimbursement of Credit Balances 49
(g) Optional Purchase of Covered Assets 50
(h) Adjustments 50
(i) Repayment 51
§ 7 Indemnification 52
(a) Undisclosed Liabilities 53
(b) Unreserved for Claims 55
(c) Challenges to the Acquisition or the Mergers 55
(d) Pursuit of Related Claims 56
(e) Payments as Contributions 58
(f) Limitations on Indemnification and Federated Financial Loan Losses 58
§ 8 Acquired Association Claims and Related Claims 59
§ 9 Duplicate Payments 62
§ 10 Non-Reimbursable Expenses 63
§ 11 Reports, Records 63
(a) Quarterly Reports 63
(b) Reports on Covered Assets 65
(c) Final Accounting 65
(d) Access to Books and Records 66
(e) dits and Examinations 66
(f) Reports Concerning Prosecution of Claims by Court Action and Settlement of Claims and Liabilities 67
(g) Reports on Net Tax Benefits 70
(h) Other Reports 70

§ 12 Covenants of STATESMAN, AMERICAN LIFE the ACQUIRER and the ACQUIRING ASSOCIATION..... 71
(a) Administration of Assets and Liabilities..... 71
(1) Management Standard 71
(2) Pursuit of Claims..... 72
(b) Conduct of Litigation 73
(c) Covered Asset Restrictions 76
(d) Covered Asset Requirements..... 77
(e) Disclosure of Agreement..... 79
(f) Tax Benefits 79
§ 13 Sale and Repair of Covered Assets 80
§ 14 Foreclosures 85
§ 15 CORPORATION's Right to Purchase Covered Assets 88
§ 16 Sale of Assets of the ACQUIRING ASSOCIATION 90
§ 17 Accounting Principles..... 91
§ 18 Notices 92
§ 19 Termination of Agreement 93
§ 20 Compliance with Law 95
§ 21 Rights and Forbearances 96
§ 22 Governing Law 96
§ 23 Entire Agreement, Severability 96
§ 24 Counterparts, Modifications, Headings ... 97
§ 25 Successors and Assigns..... 97
§ 26 Sole Benefit 98
§ 27 Continuing Cooperation 98
§ 28 Brokerage Commission..... 98A
Signature Page..... 99
Exhibit A: Form of Promissory Note
Exhibit B: Form of Subordinated Debenture

ASSISTANCE AGREEMENT

THIS AGREEMENT, dated March 11, 1988, is entered into by and among THE STATESMAN GROUP, INC., a Delaware corporation ("STATESMAN"), AMERICAN LIFE AND CASUALTY INSURANCE COMPANY, a North Dakota corporation wholly owned by STATESMAN ("AMERICAN LIFE"), STATESMAN SAVINGS HOLDING CORP., Des Moines, Iowa, a savings and loan holding company incorporated under the laws of the State of Iowa and owned by STATESMAN and AMERICAN LIFE ("ACQUIRER"), STATESMAN BANK FOR SAVINGS, FSB, Waterloo, Iowa, a federal stock savings bank wholly owned by the ACQUIRER ("ACQUIRING ASSOCIATION"), and the FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION ("FSLIC"), in its capacity as a corporate instrumentality and agency of the United States ("CORPORATION").

RECITALS

A. The ACQUIRING ASSOCIATION has been organized and chartered as a federal stock savings bank pursuant to § 406(a), (b)(1)(A), (c)(1)(B) and (c)(3)(B) of the National Housing Act, as amended ("NHA"), 12 U.S.C. § 1729(a), (b)(1)(A), (c)(1)(B) and (c)(3)(B) (1982), and the ownership of the ACQUIRING ASSOCIATION to the ACQUIRER and the ownership of the ACQUIRER by STATESMAN and AMERICAN LIFE have been authorized by the Federal Home Loan Bank Board ("Bank Board") by Resolution No. 88-169, dated March ____, 1988, in accordance with § 408(e) and (m) of the NHA, 12 U.S.C § 1730a(e) and (m) (1982).

B. On March 11, 1988, the FSLIC was appointed receiver ("Receiver") for First Federated Savings Bank, West Palm Beach, Florida, a stock savings bank chartered under the laws of the State of Florida ("CLOSED ASSOCIATION"). The Bank Board, by Resolution No. 88–169, dated March 11, 1988, has authorized the ACQUIRING ASSOCIATION to purchase and assume substantially all of the assets and liabilities, respectively, of the CLOSED ASSOCIATION from the Receiver ("Acquisition") pursuant to the Acquisition Agreement ("Acquisition Agreement") of even date herewith between the Receiver and the ACQUIRING ASSOCIATION.

C. The Bank Board, by Resolution No. 88-169, dated March ____, 1988, has authorized the supervisory conversion of First Federal Savings Bank, Waterloo, Iowa, a federally-chartered mutual savings bank ("First Federal"), and the merger of First Federal with and into the ACQUIRING ASSOCIATION ("First Federal Merger"), pursuant to the Merger Agreement and Plan of Merger of even date herewith between First Federal and the ACQUIRING ASSOCIATION ("First Federal Merger Agreement").

D. The Bank Board, by Resolution No. 88-169, dated March ____, 1988, has authorized the supervisory conversion of The Perpetual Savings and Loan Association, Waterloo, Iowa, a mutual savings and loan association chartered under the laws of the State of Iowa ("Perpetual"), and the merger of Perpetual with and into the ACQUIRING ASSOCIATION ("Perpetual Merger"), pursuant to the Merger Agreement and Plan of Merger of even date herewith between Perpetual and the ACQUIRING ASSOCIATION ("Perpetual Merger Agreement").

E. The Bank Board, by Resolution No. 88–169, dated March ____, 1988, has authorized the supervisory

conversion of Peoples Federal Savings and Loan Association, Waterloo, Iowa, a federally-chartered mutual savings and loan association ("Peoples"), and the merger of Peoples with and into the ACQUIRING ASSOCIATION ("Peoples Merger"), pursuant to the Merger Agreement and Plan of Merger of even date herewith between Peoples and the ACQUIRING ASSOCIATION ("Peoples Merger Agreement").

F. First Federal, Perpetual and Peoples may be sometimes referred to herein individually as a "MERGED ASSOCIATION" and collectively as the "MERGED ASSOCIATIONS". The MERGED ASSOCIATIONS and the CLOSED ASSOCIATION may be sometimes referred to herein individually as an "ACQUIRED ASSOCIATION" and collectively as the "ACQUIRED ASSOCIATIONS". The First Federal Merger, the Perpetual Merger and the Peoples Merger may be sometimes referred to herein individually as a "Merger" and collectively as the "Mergers", and the First Federal Merger Agreement, the Perpetual Merger Agreement and the Peoples Merger Agreement may be sometimes referred to herein individually as a "Merger Agreement" and collectively as the "Merger Agreements".

G. The Bank Board, by Resolution No. 88-169, dated March ____, 1988, has certified for purposes of Section [illegible](a)(3)(D) of the Internal Revenue Code that the ground set forth in 12 U.S.C. § 1464(d)(6)(A)(i) exists with respect to each ACQUIRED ASSOCIATION in that each ACQUIRED ASSOCIATION is insolvent.

H. The CORPORATION insured the accounts of the CLOSED ASSOCIATION prior to the appointment of the Receiver and insured the accounts of each MERGED ASSOCIATION prior to the Mergers, and the CORPORATION will insure the accounts of the

ACQUIRING ASSOCIATION after the Acquisition and the Mergers, in accordance with § 403 of the National Housing Act, as amended ("NHA"), 12 U.S.C. § 1726 (1982).

I. The ACQUIRING ASSOCIATION, pursuant to the Acquisition Agreement, will succeed to substantially all of the rights, obligations, duties and liabilities of the CLOSED ASSOCIATION, and substantially all of the assets and property of every kind and character belonging to the CLOSED ASSOCIATION will be vested in and become the property of the ACQUIRING ASSOCIATION.

J. The ACQUIRING ASSOCIATION, pursuant to the Merger Agreements, will succeed to all of the rights, obligations, duties and liabilities of the MERGED ASSOCIATIONS, and all of the assets and property of every kind and character belonging to the MERGED ASSOCIATIONS will be vested in and become the property of the ACQUIRING ASSOCIATION.

K. A condition to the obligation of the ACQUIRING ASSOCIATION to consummate the Acquisition pursuant to the Acquisition Agreement, a condition to the obligations of the respective parties to the Mergers to consummate the Mergers pursuant to the Merger Agreements, and a condition of the ACQUIRER to acquire the common stock of the ACQUIRING ASSOCIATION, is that the CORPORATION, STATESMAN, AMERICAN LIFE, the ACQUIRER and the ACQUIRING ASSOCIATION enter into an agreement in the form of this Agreement, pursuant to which the CORPORATION will provide financial assistance and indemnification to the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN and AMERICAN LIFE.

L. The CORPORATION has decided, pursuant to § 406(f)(1)-(4) of the NHA, 12 U.S.C. § 1729(f)(1)-(4)

(1982), to provide financial assistance and indemnification as set forth in this Agreement, having determined that each ACQUIRED ASSOCIATION is in danger of default and that the amounts payable pursuant to such assistance and indemnification would be less than the losses the CORPORATION would sustain upon the liquidation of the ACQUIRED ASSOCIATIONS through receiverships accompanied by payments of insurance of accounts.

M. In consideration of the mutual promises contained in this Agreement, the parties hereto enter into the following agreement.

AGREEMENT

Section 1. *Definitions.* For the purposes of this Agreement, the following terms have the indicated meanings:

(a) *"Acquired Association Claim"*: Any Claim that any MERGED ASSOCIATION or the ACQUIRING ASSOCIATION as its successor has against (1) any person who is or was, on or prior to the Effective Date, a director, officer, controlling person (including any person who directly or indirectly exercised a controlling influence over the management or policies of any MERGED ASSOCIATION or any subsidiary thereof), employee or agent of any MERGED ASSOCIATION or any subsidiary thereof, or an auditor, accountant, attorney, appraiser, broker, loan broker, deposit broker, securities dealer, investment banker, financial advisor or other professional, individual or entity that has performed services for any MERGED ASSOCIATION or any subsidiary thereof, or an employee, agent or other person acting for or in concert with any such person, *provided* that an action

or inaction of any such person on or prior to the Effective Date gave rise, in whole or in part, to such Claim; (2) an insurer who may be liable for indemnification of the loss caused, in whole or in part, by the action or inaction of any person identified in § 1(a)(1) above; (3) an officer, director, agent, administrator, executor, personal representative, heir or assign of any person identified in § 1(a)(1) above; or (4) any other person or persons, partnership, corporation, or legal entity, and any officer, director, partner, agent, administrator, executor, personal representative, heir or assign of any such third party, *provided* that the Claim against any such third party is related to a Claim against a party referred to in § 1(a)(1), (2) or (3) above. No Acquired Association Claim shall include any claim of the ACQUIRING ASSOCIATION against a party referred to above to collect on a loan made by any MERGED ASSOCIATION on which loan such party is an obligor.

(b) "*Affiliate*": Affiliate, as that term is defined in § 561.25 of the Insurance Regulations.

(c) "*Appraised Equity Capital*": Appraised equity capital as that term is defined in § 563.13(c) of the Insurance Regulations.

(d) "*Bank*": The Federal Home Loan Bank of Des Moines.

(e) "*Bank Board*": The Federal Home Loan Bank Board.

(f) "*Book Value*": When used in connection with a Related Claim or an Acquired Association Claim, and (except as set forth in § 1(f)(2) and (3) below) when used with respect to a Covered Asset, Book Value shall mean the value reflected on the books and records immediately prior to the Effective Date of the ACQUIRED ASSOCIATION that owned such Claim or Covered Asset immediately prior to the Effective

Date (excluding any special reserve or valuation allowance for such Covered Asset on the books of such ACQUIRED ASSOCIATION immediately prior to the Effective Date), as adjusted by the Initial Audit and as thereafter adjusted or determined in accordance with the accounting principles required by this Agreement.

(1) Except as set forth in § 1(f)(2) and (3) below, the following shall be included in the determination of Book Value:

(A) With respect to any property or interest herein which secures a Covered Asset and which is acquired by the ACQUIRING ASSOCIATION after the Effective Date by Foreclosure,

(i) The outstanding principal amount of the indebtedness secured by such property (excluding any specific loss reserve or valuation allowance relating to such indebtedness);

(ii) Any taxes or hazard insurance premiums due and payable or accrued as of the Effective Date that are subsequently paid by the ACQUIRING ASSOCIATION;

(iii) The costs, fees, and expenses of Foreclosure, *provided* that any costs, fees, and expenses incurred incident to the acceptance of a deed in lieu of foreclosure, or in connection with the repossession of property sold subject to a sales contract or loan which is in default, shall be included in Book Value only if the ACQUIRING ASSOCIATION complies with § 14(c) of this Agreement;

(iv) The amount, if approved in advance by the CORPORATION, paid for the satisfaction or settlement of a lien upon a Covered Asset or security for a Covered Asset, *provided* that such amount has not been reimbursed under another provision of this Agreement;

(v) Any unamortized premium paid or capitalized by the ACQUIRING ASSOCIATION; and

(vi) Any other costs, fees, and expenses associated with the acquisition of any property or interest therein that secures a Covered Asset, *provided* that such costs, fees, and expenses have not been reimbursed under another provision of this Agreement and have been approved in advance by the CORPORATION.

(B) Properly capitalized expenses or assessments, if approved in advance by the CORPORATION, for the repair, rehabilitation, or completion of property that is a Covered Asset, or security for a Covered Asset; *provided* that such expenses and assessments are within the limits permitted by § 13 of this Agreement, have not been reimbursed under another provision of this Agreement, and are determined in accordance with the accounting principles required by this Agreement;

(2) The following shall *not* be included in the determination of Book Value for Covered Assets:

(A) Any amount of specific reserves and valuation reserves of any ACQUIRED ASSOCIATION as of the Effective Date, as adjusted by the Initial Audit;

(B) Any amount of accrued and uncollected interest or late charges on the principal amount of the indebtedness related to a Covered Asset that has been accrued through the Effective Date;

(C) The undisbursed portion of any loan in process account, *provided,* however, that disbursements made after the Effective Date pursuant to a legally binding commitment of the ACQUIRED ASSOCIATION that owned such Covered Asset which exists immediately prior to the Effective Date, or pursuant to the prior written consent of the CORPORATION, shall be included in Book Value;

(D) The amount of any deferred income related to a Covered Asset, including, without limitation, unearned discounts on loans purchased, unearned profit on real estate sold, deferred loan fees or acquisition credits, unearned discounts on installment loans, deferred gains on securities, and other unearned discounts;

(E) With respect to any Covered Asset reflected on an ACQUIRED ASSOCIATION's books and records immediately prior to the Effective Date, any adjustment to the value of such Covered Asset made solely as a result of the accounting treatment of the Acquisition or the Mergers as a purchase of assets;

(F) The amount of any net operating income or loss determined in accordance with the accounting principles required by this Agreement and attributable to Covered Assets on the books and records of any ACQUIRED ASSOCIATION immediately prior to the Effective Date or acquired as a result of Foreclosure with respect to a Covered Asset; and

(G) The cost of appraisals required by the CORPORATION pursuant to this Agreement.

(3) Book Value, when used with respect to a Covered Asset that becomes such pursuant to § 1(h)(4) of this Agreement, shall mean the value of the Covered Asset on the books and records of the ACQUIRING ASSOCIATION as of the consummation of the transaction consented to pursuant to said § 1(h)(4), as such value may be adjusted in accordance with the accounting principles required by this Agreement.

(4) Notwithstanding the foregoing, unless the CORPORATION expressly permits the write-down of the Book Value of a Covered Asset and a charge to the Special Reserve Account pursuant to § 3(a)(1) and § 4 of this Agreement, Book Value shall not be

adjusted for any uninsured casualty loss or anticipated loss on any such Covered Asset, even though a specific reserve is or has been created for such anticipated loss or the asset's value is or has been written down pursuant to a regulatory requirement.

(g) *"Claim"*: Any claim, demand, or cause of action.

(h) *"Covered Asset"*: Except as provided in § 1(h)(5), the term "Covered Asset" means the following:

(1) Any loan which is on the books of any ACQUIRED ASSOCIATION immediately prior to the Effective Date that is contractually delinquent 90 days or more as of the Effective Date or that becomes contractually delinquent 90 days or more at any time within two years after the Effective Date; *provided* that, with respect to loans other than Participation Interests, Foreclosure is formally instituted within the later of 18 months from the Effective Date or 90 days after the date on which such loan has become a Covered Asset; and *provided further* that, if Foreclosure is delayed or barred by an order or ruling of any court of proper jurisdiction or by operation of law, then the applicable period within which Foreclosure must be formally instituted shall be extended until a reasonable time following the date on which Foreclosure is no longer delayed or barred.

(2) Real Estate Owned on the books of any ACQUIRED ASSOCIATION immediately prior to the Effective Date or acquired after the Effective Date as a result of a Foreclosure of any loan constituting a Covered Asset.

(3) Real Estate in Judgment and Real Estate Held for Investment on the books of any ACQUIRED ASSOCIATION immediately prior to the Effective Date.

(4) A loan, contract, or investment made by the ACQUIRING ASSOCIATION in connection with or to

facilitate the sale of, or to salvage, a Covered Asset, or any property or interest therein received in exchange for a Covered Asset, if, prior to the making of any such loan, contract, investment, or exchange of a Covered Asset the ACQUIRING ASSOCIATION has obtained the CORPORATION's written consent to the transaction and to the treatment as a Covered Asset of such loan, contract, investment, or property or interest received in exchange for a Covered Asset; *provided* that the CORPORATION's consent shall not be required if such Covered Asset is a Participation Interest and if, notwithstanding the ACQUIRING ASSOCIATION's best efforts to oppose such loan, contract, investment or exchange, the ACQUIRING ASSOCIATION (as a consequence of being the successor to a contractual or other legal obligation incurred by one of the ACQUIRED ASSOCIATIONS or as a consequence of entering into a contractual or other legal obligation which has been approved in writing by the CORPORATION) is contractually or otherwise legally obligated to make such loan, contract or investment or accept such exchange.

(5) Notwithstanding anything herein to the contrary, Covered Assets shall not include:

(A) Loans secured by valid and enforceable first liens or first mortgages on one to four family dwelling units;

(B) Loans secured by valid and enforceable first liens or first mortgages with an outstanding principal balance of $50,000 or less, *provided* that a participation loan is not excluded unless the total outstanding principal balance of the participation loan, not just the portion held by the ACQUIRING ASSOCIATION, is $50,000 or less;

(C) Any one to four family dwelling units;

(D) Any office buildings and facilities of any ACQUIRED ASSOCIATION, any real estate or

leasehold interest appurtenant thereto, any parking lots, any leasehold improvements, office furniture, fixtures and equipment, and any real estate held for development as an office site of any ACQUIRED ASSOCIATION; and

(E) Any property, real or personal, or interest therein, or any asset of any nature or kind that belongs to or is claimed to belong to a subsidiary of any ACQUIRED ASSOCIATION.

(i) *"Covered Asset Loss"*: The amount:

(1) by which the Book Value of a Covered Asset exceeds the Net Proceeds Received by the ACQUIRING ASSOCIATION upon the Liquidation of such Covered Asset; or

(2) of any write-down in Book Value of a Covered Asset approved by the CORPORATION pursuant to § 4(b) of this Agreement.

(j) *"Covered Asset Recovery"*: The amount by which the Net Proceeds Received by the ACQUIRING ASSOCIATION upon the Liquidation of any Covered Asset exceeds the Book Value of such Covered Asset or, if such Book Value had been written down with the CORPORATION's permission as provided in § 4(b) of this Agreement, the amount by which the Net Proceeds Received exceeds the Book Value as written down.

(k) *"Credit"* or *"Credit Item"*: An amount credited to the Special Reserve Account pursuant to the provisions of § 3(c) of this Agreement.

(l) *"Debit"* or *"Debit Item"*: An amount charged or debited to the Special Reserve Account pursuant to the provisions of § 3(a).

(m) *"Effective Date"*: The date and time at which the Acquisition and the Mergers have all become effective pursuant to the terms of the Acquisition Agreement, the Merger Agreements, Bank Board Resolutions and applicable law.

(n) *"Federal Regulations"*: The Rules and Regulations for the Federal Savings and Loan System, 12 C.F.R. § 541.1 *et seq.* (1987), as now or hereafter in effect.

(o) *"Federated Financial Loans"*: Loans that are insured by a governmental or private mortgage insurer and that are serviced by the CLOSED ASSOCIATION's wholly-owned subsidiary, Federated Financial Corporation ("Federated Financial"): (1) that are in the process of Foreclosure on the Effective Date, (2) that are contractually delinquent 90 days or more as of the Effective Date, or (3) with respect to which the first or second settlement check has not been provided by the appropriate mortgage insurer as of the Effective Date.

(p) *"Foreclosure"*: Unless specifically indicated otherwise by the context, includes, in addition to foreclosure, (1) the forfeiture of a contract of sale or a contract for deed, (2) a trustee's sale under a deed of trust, (3) the grant of a deed in lieu of foreclosure, (4) the acquisition of title to real estate pursuant to other comparable procedures allowed under applicable law, (5) the acquisition of title to any property securing a loan that is a Covered Asset pursuant to procedures for the enforcement of a security interest in such property under applicable law, or (6) the exercise of rights of possession to or control over personal property arising under contract or applicable law.

(q) *"GAAP"*: Generally accepted accounting principles, as applied in the savings and loan industry.

(r) *"Initial Audit"*: The audit to be performed pursuant to § 5(a) of this Agreement.

(s) *"Insurance Regulations"*: The Rules and Regulations for the Federal Savings and Loan Insurance Corporation, 12 C.F.R. § 561.1 *et seq.* (1987), as now or hereinafter in effect.

(t) *"Liquidation"*: As used in reference to a Covered Asset, Federated Financial Loan, Claim, Acquired Association Claim, or Related Claim:

(1) A sale of any asset or loan, at other than a Foreclosure sale at which the ACQUIRING ASSOCIATION is the purchaser, whether for cash or on other terms; *provided, however,* that the sale of any asset or loan between the ACQUIRING ASSOCIATION and the ACQUIRER, STATESMAN, AMERICAN LIFE or any other Affiliate of the ACQUIRING ASSOCIATION shall not constitute a Liquidation hereunder unless specifically approved in writing by the CORPORATION; or

(2) The release, compromise, satisfaction, settlement, reduction to judgment, or assignment to other than the CORPORATION of any Claim.

(u) *"Negative Regulatory Capital"*: The amount by which regulatory capital as defined in § 561.13 of the Insurance Regulations, as adjusted in this § 1(u), is less than zero. In determining such Negative Regulatory Capital for the purposes of this § 1(u):

(1) All general loss reserves, specific loss reserves or valuation allowances on Covered Assets (other than any such reserves or valuation allowances established for accrued and uncollected interest or for single family residential properties constituting REO) shall be credited to regulatory capital;

(2) Deferred losses on loans and investments which have been disposed of by an ACQUIRED ASSOCIATION prior to the Effective Date shall be debited to regulatory capital;

(3) Appraised Equity Capital, goodwill and other intangibles (of the type reported on line item A540 of the Quarterly Financial Report filed with the Bank Board) on the books and records of the ACQUIRED ASSOCIATIONS as of the Effective Date shall be debited to regulatory capital;

(4) The value of the CLOSED ASSOCIATION's investment in, including loans to, Federated Financial as of the Effective Date shall be adjusted to $15 million; and

(5) The value of single family residential properties constituting REO of any of the ACQUIRED ASSOCIATIONS shall be the fair market value of such properties as determined by the Initial Audit required by § 5(a) of this Agreement, provided that fair market value shall be calculated using a statistical sampling technique satisfactory to the ACQUIRING ASSOCIATION and the CORPORATION.

(v) *"Net Proceeds Received"*: As used in reference to the amount received by any of the parties hereto upon the Liquidation of a Claim, Related Claim, Covered Asset, Acquired Association Claim or Federated Financial Loan, the amount computed by deducting from the gross proceeds received (including any amounts received from a governmental or private mortgage insurer) all reasonable expenses in the form of payments to third parties actually incurred or paid by the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN or AMERICAN LIFE or the CORPORATION with respect to Claims assigned to the CORPORATION or Covered Assets or Federated Financial Loans purchased by the CORPORATION, *provided,* that such expenses have not been reimbursed otherwise. Such reasonable expenses may include, but not be limited to, attorneys' and accountants' fees, travel expenses, court costs and related expenses, litigation expenses, settlement charges, sales commissions and such other actual and reasonable costs that are directly related to the Liquidation of the Covered Asset, Federated Financial Loan or particular Claim.

(w) *"Note"*: A promissory note issued by the CORPORATION in substantially the form of Exhibit A attached hereto.

(x) *"Participation Interest"*: The interest of the ACQUIRING ASSOCIATION as successor to any ACQUIRED ASSOCIATION in any loan whereby the beneficial ownership of the indebtedness has been sold to more than one obligee including an ACQUIRED ASSOCIATION, but with respect to which the ACQUIRING ASSOCIATION does not act as lead lender or have the ability, through the exercise of voting power or otherwise, to in any way control the administration of the loan or the disposition of any assets securing the loan. Where, before or after the Effective Date, any such loan has gone into default and the lead lender has foreclosed upon or otherwise acquired title to the assets securing any such loan, the term "Participation Interest" shall include the ACQUIRING ASSOCIATION's interest in such assets.

(y) *"Quarter"*: Three consecutive calendar months, *provided* that the first Quarter during the term of this Agreement shall be deemed to be the period, if any, from the Effective Date to and including the last day preceding the first day of the first full calendar quarter following the Effective Date, and *provided* further, that the last quarter during the term of this Agreement shall be deemed to include the period, if any, from the first day after the last day of the last full calendar quarter during the term of this Agreement to the date on which this Agreement terminates.

(z) *"Real Estate Held for Investment"*: Real Estate held for sale, development or investment by any ACQUIRED ASSOCIATION.

(aa) *"Real Estate in Judgment"*: Real estate acquired by Foreclosure for which the applicable period of redemption has not expired.

(bb) *"Real Estate Owned" or "REO"*: Real estate or such other property acquired by Foreclosure, which following Foreclosure is not held for investment or for use in development as an office site of the ACQUIRING ASSOCIATION.

(cc) *"Regulatory Capital Maintenance Agreement"*: The agreement among the ACQUIRER, the ACQUIRING ASSOCIATION, STATESMAN, AMERICAN LIFE and the CORPORATION of even date herewith, in the form or substantially in the form of Exhibit B attached hereto, pursuant to which the ACQUIRER and the ACQUIRING ASSOCIATION agree to maintain the regulatory capital of the ACQUIRING ASSOCIATION at a certain level, STATESMAN and AMERICAN LIFE provide a limited guarantee of such agreement and AMERICAN LIFE grants to the CORPORATION certain voting and disposition rights with respect to the common stock of the ACQUIRER held by AMERICAN LIFE.

(dd) *"Reimbursable"*: As used in describing a liability, loss, charge, expenses, Claim, Acquired Association Claim, or Related Claim of the ACQUIRING ASSOCIATION, "Reimbursable" shall mean a liability, loss or Claim as to which the ACQUIRING ASSOCIATION has or had a right to reimbursement under any bond, insurance policy or other source (other than this Agreement), including any such liability, loss or Claim as to which the ACQUIRING ASSOCIATION does not receive reimbursement due to its failure to pursue timely or vigorously such right in accordance with the management standard described in § 12 of this Agreement.

(ee) *"Related Claim"*: Any counterclaim, offset, insurance settlement, or other Claim which may result in a recovery by the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN or AMERICAN

LIFE and which is related to a Claim, liability, or loss under § 3 of this Agreement, and for which the CORPORATION is obligated to indemnify or pay the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN or AMERICAN LIFE under this Agreement.

(ff) *"Special Reserve Account"*: The account established pursuant to § 3 of this Agreement.

(gg) *"Termination Date"*: The date five (5) years after the Effective Date.

Section 2. *Conditions.*

(a) The obligations of the parties under this Agreement are conditioned upon the satisfaction of all of the following conditions:

(1) Each Merger being duly authorized by the board of directors of the respective MERGED ASSOCIATION and effected in compliance with its charter and bylaws and applicable law;

(2) The execution and delivery of each Merger Agreement being duly authorized by the board of directors of the respective MERGED ASSOCIATION in contemplation of each Merger; and

(3) Receipt of certified copies of the corporate resolutions of the MERGED ASSOCIATIONS authorizing the Mergers and the execution and delivery of the Merger Agreements.

(b) The CORPORATION's obligations under this Agreement are also conditioned upon the satisfaction of all of the following conditions:

(1) The consummation of the Acquisition and the Mergers;

(2) The execution and delivery by the ACQUIRER, the ACQUIRING ASSOCIATION, STATESMAN and AMERICAN LIFE, as appropriate, of the Regulatory Capital Maintenance Agreement, a proxy in the form or substantially in the form

of the Irrevocable Proxy attached to such agreement, and a Misconduct Certification;

(3)(A) Receipt of an opinion from outside counsel for the ACQUIRING ASSOCIATION, in form and substance satisfactory to the CORPORATION and its counsel, to the effect that the purchase of substantially all of the assets and the assumption of substantially all of the liabilities of the CLOSED ASSOCIATION by the ACQUIRING ASSOCIATION, and the merger of each MERGED ASSOCIATION with and into the ACQUIRING ASSOCIATION, have been duly authorized by the directors of the ACQUIRING ASSOCIATION and effected in compliance with the ACQUIRING ASSOCIATION's charter and bylaws and applicable law and that the Acquisition Agreement, the Merger Agreements, the Regulatory Capital Maintenance Agreement and this Agreement have been duly authorized, executed and delivered by, and constitute valid and binding obligations of, the ACQUIRING ASSOCIATION, enforceable in accordance with their respective terms, except as enforceability thereof may be limited by bankruptcy, insolvency, reorganization, moratorium or similar laws affecting the rights of creditors generally, and except that the remedy of specific performance and injunctive and other forms of equitable relief are subject to certain equitable defenses and to the discretion of the court before which any proceedings may be brought;

(B) Receipt of a certified copy of the corporate resolutions of the ACQUIRING ASSOCIATION authorizing execution and delivery on its behalf of the Acquisition Agreement, the Merger Agreements, the Regulatory Capital Maintenance Agreement and this Agreement;

(4)(A) Receipt of an opinion from outside counsel for the ACQUIRER, STATESMAN and AMERICAN

LIFE, in form and substance satisfactory to the CORPORATION and its counsel, to the effect that the purchase of all of the stock of the ACQUIRING ASSOCIATION by the ACQUIRER has been duly authorized by the directors of the ACQUIRER and effected in compliance with the ACQUIRER's charter and bylaws and applicable law and that this Agreement, the Regulatory Capital Maintenance Agreement (including the form of Irrevocable Proxy attached thereto), the Preferred Stock identified in § 6(d) and the Subordinated Debenture identified in § 6(e) have been duly authorized, executed, and delivered by, and constitute valid and binding oblitigations of, the ACQUIRER, STATESMAN and AMERICAN LIFE, as appropriate, enforceable in accordance with their respective terms, except as enforceability thereof may be limited by bankruptcy, reorganization, insolvency, moratorium or similar laws affecting the rights of creditors generally, and except that the remedy of specific performance and injunctive and other forms of equitable relief are subject to certain equitable defenses and to the discretion of the court before which any proceedings may be brought;

(B) Receipt of certified copies of the corporate resolutions of the ACQUIRER, STATESMAN and AMERICAN LIFE authorizing execution and delivery on their behalf of this Agreement, the Regulatory Capital Maintenance Agreement and the Irrevocable Proxy, the Preferred Stock and the Subordinated Debenture, as appropriate;

(5) Receipt of a copy of the stock certificate issued by the ACQUIRING ASSOCIATION to the ACQUIRER, which certificate shall include a statement to the effect that the shares represented thereby are restricted as to transfer as provided in the Regulatory Capital Maintenance Agreement;

(6) All corporate and other proceedings taken in connection with the Acquisition and the Mergers, and all documents incident thereto, shall be satisfactory in form and substance to the CORPORATION and its counsel, and the CORPORATION and its counsel shall have received all such counterpart originals or certified or other copies of such documents as either may reasonably request; and

(7) The ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN, AMERICAN LIFE and any of their respective Affiliates and subsidiaries, within the time periods specified by the terms of this Agreement or by the Bank Board, (1) shall have executed and delivered to the CORPORATION all other agreements, instruments, and documents required to be executed and delivered by the terms of this Agreement and by any action of the Bank Board in approving the Acquisition, the Mergers and related transactions and (2) shall have taken all other actions imposed, in any action by the Bank Board approving the Acquisition, the Mergers or related transactions, as conditions to the CORPORATION's obligation to provide assistance hereunder.

(c) The obligations of the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN and AMERICAN LIFE under this Agreement are also conditioned upon the satisfaction of all of the following conditions:

(1) The consummation of the Acquisition, the Mergers and the other transactions contemplated by this Agreement; and

(2) Receipt of certified copies of the resolutions of the Bank Board authorizing execution and delivery on behalf of the CORPORATION or the Receiver of the Acquisition Agreement, the Regulatory Capital Maintenance Agreement and this Agreement.

Section 3. *Special Reserve Account.* The ACQUIRING ASSOCIATION for itself and the ACQUIRER,

STATESMAN and AMERICAN LIFE shall establish as of the Effective Date a single memorandum account, with an opening balance of zero, to be called the Special Reserve Account, and shall maintain such account solely for the purpose of, and in accordance with, the provisions of this Agreement, without limitation of its duty to maintain its books and records in accordance with proper accounting procedures and the Insurance Regulations.

(a) *Debits.* The ACQUIRING ASSOCIATION, for itself and the ACQUIRER, STATESMAN and AMERICAN LIFE, following the Effective Date, may charge as Debits to the Special Reserve Account amounts equal to each of the following items:

(1) *Covered Asset Losses.* Ninety-three percent (93%) of each Covered Asset Loss;

(2) *Appraisal Costs.* The cost of any independent appraisal required by the CORPORATION pursuant to this Agreement and paid for by the ACQUIRING ASSOCIATION; *provided,* that the appraiser selected by the ACQUIRING ASSOCIATION and the cost of appraisal have been approved in advance by the CORPORATION, and *provided further* that the ACQUIRING ASSOCIATION shall instruct the appraiser to deem both the ACQUIRING ASSOCIATION and the CORPORATION as its client and to conduct the appraisal in accordance with standards approved by the Bank Board;

(3) *Indemnification.* The amounts owed by the CORPORATION under § 7 of this Agreement pursuant to its obligations to indemnify the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN and AMERICAN LIFE;

(4) *Claim Expenses.* The amount of the reasonable costs and expenses incurred by the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN and

AMERICAN LIFE, where appropriate, in pursuit of a Related Claim or Acquired Association Claim, and reimbursable by the CORPORATION pursuant to § 7 or § 8 of this Agreement;

(5) *Covered Asset Purchase.* The amount of the purchase price of a Covered Asset purchased by the CORPORATION in accordance with §§ 13 or 15 of this Agreement;

(6) *Payment of Credits.* The amount of any payments made by the ACQUIRING ASSOCIATION, for itself and the ACQUIRER, STATESMAN and AMERICAN LIFE, to eliminate a Credit balance in the Special Reserve Account;

(7) *Expenses to Cure.* The amount of other payments or costs incurred with the CORPORATION's prior written approval in order to cure or salvage any Covered Asset or security for a Covered Asset or prevent a substantial deterioration in value of a Covered Asset, *provided* that such payments or costs are not appropriately capitalized under the accounting principles required by this Agreement;

(8) *Assignment of Related Claim and Acquired Association Claim and Excess Recoveries.* The Book Value reflected on the books and records of an ACQUIRED ASSOCIATION immediately prior to the Effective Date of a Related Claim or Acquired Association Claim assigned to the CORPORATION pursuant to § 8(b) of this Agreement and any excess recovery on any such claim to be debited to the Special Reserve Account pursuant to § 8(e) of this Agreement.

(9) *Uncollected Interest.* The amount of the ACQUIRED ASSOCIATION's uncollected interest on any Covered Asset accrued prior to the Effective Date that remains uncollected subsequent to the Effective Date, at such time as such accrued and uncollected

interest is determined by the ACQUIRING ASSOCIATION, with the written concurrence of the CORPORATION, to be uncollectible and is written off, *provided*, that this amount shall not include any amounts paid by the CORPORATION to the ACQUIRING ASSOCIATION pursuant to § 6(a)(1) and (2) of this Agreement, including any amounts with respect to which general loss reserves, specific loss reserves or valuation allowances were established prior to the Effective Date; and *provided further*, that the amounts of such interest that are subsequently collected shall be credited to the Special Reserve Account upon collection.

(10) *Yield Subsidy.*

(A) For any given Quarter during the first five years of this Agreement, with respect to all Covered Assets which have not been liquidated at the beginning of such Quarter, the excess, if any, of (i) the Guaranteed Yield Amount, as computed below over (ii) the actual yield, whether positive or negative, during such Quarter on such Covered Assets, which shall include all interest and other income received or accrued which as attributable to such Covered Assets, including, specifically, with respect to Real Estate Owned, Real Estate Held for Investment, and Real Estate in Judgment, any net operating income or net operating loss; *provided*, that for any Quarter during the term of this Agreement in which the actual yield exceeds the Guaranteed Yield provided for hereunder, there shall be a Credit to the Special Reserve Account for the amount of such excess.

Net operating income or operating loss on Real Estate Owned, Real Estate Held for Investment and Real Estate in Judgment shall be determined by deducting all expenses directly attributable to such real estate (including all items appropriately expensed

under GAAP, but specifically excluding depreciation and the ACQUIRING ASSOCIATION's administrative and overhead expenses), from the gross income attributable to such real estate.

(B) The Guaranteed Yield Amount for any Quarter constituting a full calendar quarter shall be computed by multiplying the Average Book Value of such Covered Assets for such quarter (determined for a given Quarter by adding the Book Value of all unsold Covered Assets on the first day of the Quarter and the Book Value of all unsold Covered Assets on the last day of each calendar month within the Quarter and dividing the sum by four) by the Guaranteed Yield Percentage. The Guaranteed Yield Percentage for all Covered Assets other than Participation Interests shall be equal to one-quarter of a rate that is equal to the cost of funds for savings and loan institutions operating in the Bank Board's Eighth District, as most recently reported at the end of a Quarter by the Bank ("Eighth District COF"), plus 225 basis points until the second anniversary of the Effective Date, shall then decline by 50 basis points and shall decline further by an additional 25 basis points on the third anniversary of the Effective Date and on each anniversary thereafter until the termination of the CORPORATION's obligations under this Agreement. The Guaranteed Yield Percentage for Participation Interests shall remain fixed at one-quarter of Eighth District COF plus 225 basis points.

(C) If the first or last Quarter during the term of this Agreement does not constitute a full Quarter, the Guaranteed Yield Amount for such Quarter shall be the product of

(i) the Average Book Value of such Covered Assets for such Quarter or portion thereof (determined by adding the Book Value of all unsold Covered Assets

on the first day of the Quarter and the last day of each calendar month ending within the Quarter or portion thereof and dividing the sum by the number of such first and last days) multiplied by a fraction (the numerator of which shall be the number of days during which this Agreement was in effect in such Quarter and the denominator of which shall be 90), and

(ii) the Guaranteed Yield Percentage.

(D) In the event of reinstatement of a loan to income-producing status and collection of delinquent interest so that such loan ceases to be a Covered Asset, the Guaranteed Yield Amount for any previous Quarter that included such loan in the determination of Average Book Value for all or any portion of such quarter shall be recalculated excluding such loan, and the sum of the differences between the Guaranteed Yield Amount as recalculated and as originally calculated for each such Quarter shall be a Credit to the Special Reserve Account. The calculation of the Credit to be made to the Special Reserve Account, if any, pursuant to this § 3(a)(10)(D) shall be made at the end of each Quarter for all loans which cease to be Covered Assets during such Quarter.

(E) With respect to loans that become contractually delinquent 90 days or more after the Effective Date, such loans shall be deemed to be Covered Assets, for purposes of this § 3(a)(10), from the time they first become contractually delinquent. At the end of each Quarter during which a loan becomes contractually delinquent 90 days or more, the Guaranteed Yield Amount for the previous Quarter (if such loan became contractually delinquent in such prior Quarter) shall be recalculated including such loan as of the day it first became contractually delinquent, and the difference between the Guaranteed Yield Amount as recalculated and as originally calculated for such

prior Quarter shall be added to the Guaranteed Yield Amount calculated for such current Quarter.

(F) For any Quarter that has more than one Guaranteed Yield Percentage applicable to portions of such Quarter, the Guaranteed Yield Percentage to be applicable to the entire Quarter shall be determined by multiplying each Guaranteed Yield Percentage by the number of days in such Quarter to which such Guaranteed Yield Percentage applies, adding the results of such multiplications. and dividing such sum by the total number of days in the Quarter.

(11) *Recoveries on Purchased Covered Assets.* Any amount permitted to be debited to the Special Reserve Account pursuant to § 15(d).

(12) *Federated Financial Loan Losses.* Eighty-five percent (85%) of the amount by which the value reflected by the books and records of Federated Financial of a Federated Financial Loan exceeds the Net Proceeds received by the ACQUIRING ASSOCIATION upon the Liquidation of such loan subject to the limitation of § 7(f)(2) of the Agreement; *provided* that the ACQUIRING ASSOCIATION: (A) provides to the CORPORATION the same rights and the same reports and other documentation, follows the same procedures and obtains from the CORPORATION the same consents, if any, it would have had to provide to, follow with respect to or obtain from the appropriate governmental or private mortgage insurer to recover losses on such loan, or (B) provides such other rights, reports and documentation, follows such other procedures and obtains such other consents as shall be mutually agreed upon by the CORPORATION and the ACQUIRING ASSOCIATION. For purposes of this paragraph the value of each such loan shall be the unpaid principal balance, unfunded escrow advances, interest advances and other advances, including but

not limited to, reasonable attorney fees, inspection fees, appraisals and insurer required repair costs.

(13) *Lease Losses.* Beginning on the dates the ACQUIRING ASSOCIATION ceases to occupy the respective leased premises, fifty percent (50%) of the expenses and losses incurred by the ACQUIRING ASSOCIATION up to the date of and upon the disposition or termination of the lease held by the CLOSED ASSOCIATION immediately prior to the Effective Date for the building located at 11300 US Highway 1, Suite 300, North Palm Beach, Florida, and the lease held by Federated Financial immediately prior to the Effective Date for the building located at 6560 Powers Ferry Road, Atlanta, Georgia; *provided* that such disposition or termination shall have been approved in writing by the CORPORATION, which approval shall not be unreasonably withheld.

(14) *Tax Benefit Adjustment Payments.* Any amount permitted to be debited to the Special Reserve Account pursuant to § 3(c)(13)(F); and

(b) *Exclusions from Debits.* The ACQUIRING ASSOCIATION, for itself and the ACQUIRER, STATESMAN and AMERICAN LIFE, may not debit the Special Reserve Account and shall not seek reimbursement from the CORPORATION for:

(1) Any of the expenses or costs of STATESMAN, AMERICAN LIFE, the ACQUIRER or the ACQUIRING ASSOCIATION incident to the Acquisition or the Mergers not specifically reimbursable under this Agreement;

(2) Any increase in the operating expenses of STATESMAN, AMERICAN LIFE, the ACQUIRER or the ACQUIRING ASSOCIATION as a result of the Acquisition or the Mergers or the administration and management of the assets and liabilities of the ACQUIRED ASSOCIATIONS not specifically reimbursable under this Agreement;

(3) Any loss, charge, or expense actually caused by the ACQUIRING ASSOCIATION's failure to comply with the management standard set forth in § 12(a) of this Agreement in its administration of the assets and liabilities of the ACQUIRED ASSOCIATIONS after the Effective Date.

(4) That portion of any loss, charge, or expense actually recovered by STATESMAN, AMERICAN LIFE, the ACQUIRER or the ACQUIRING ASSOCIATION or Reimbursable under any insurance policy or bond or other provision for funding (other than under this Agreement), including from any governmental or private mortgage insurer;

(5) Except to the extent specifically reimbursed under other sections of this Agreement, any expenses of STATESMAN, AMERICAN LIFE, the ACQUIRER or the ACQUIRING ASSOCIATION incurred in the administration of this Agreement, including, but not limited to, compensation paid to employees or agents of STATESMAN, AMERICAN LIFE, the ACQUIRER or the ACQUIRING ASSOCIATION for services performed in connection with the preparation of reports and supporting documentation required to be filed with the CORPORATION under this Agreement; and

(6) The write down of the Book Value of any Covered Asset, if the CORPORATION has denied the ACQUIRING ASSOCIATION's application pursuant to § 4 to write down such asset, of if the CORPORATION has approved the application with modifications or conditions that the ACQUIRING ASSOCIATION has not met.

(c) *Credits to Special Reserve Account.* The ACQUIRING ASSOCIATION, for itself and the ACQUIRER, STATESMAN and AMERICAN LIFE, shall promptly credit to the Special Reserve Account

an amount equal to each of the following items to the extent that such item was not shown as an asset on the books and records of the ACQUIRED ASSOCIATION immediately prior to the Effective Date, was adjusted by the Initial Audit:

(1) *Covered Asset Recoveries.* With respect to any Covered Asset, ninety-three percent (93%) of any Covered Asset Recovery on such Covered Asset;

(2) *Refunds.* The amount of any refund (excluding the tax refunds made pursuant to § 3(c)(6)) received by the ACQUIRING ASSOCIATION with respect to payments or expenditures made by any ACQUIRED ASSOCIATION prior to the Effective Date;

(3) *Pre-Effective Date Interest.* The amount of any interest not accrued by, or for which any reserves or valuation allowances were established by, an ACQUIRED ASSOCIATION prior to the Effective Date but collected by the ACQUIRING ASSOCIATION subsequent to the Effective Date;

(4) *Other Recoveries on Covered Assets.* Ninety-three percent (93%) of the amount of any other net recovery or any benefit realized by the ACQUIRING ASSOCIATION in satisfaction of or recovery on any Covered Asset in excess of Book Value or, if such Covered Asset has been written down pursuant to § 4 of this Agreement, in excess of Book Value as so written down, including but not limited to, any recoveries on any Claim or judgment related to or in connection with such Covered Asset;

(5) *Offset Gains.* Any amount the ACQUIRING ASSOCIATION recovers from other than the CORPORATION, whether by counterclaim, offset, insurance settlement, or otherwise, with respect to any liability or Claim as to which the ACQUIRING ASSOCIATION, acting for itself and the ACQUIRER, STATESMAN and AMERICAN LIFE, debited the Special Reserve Account;

(6) *Tax Refunds.* The amount of the net tax refund received after the Effective Date, if any, from whatever governmental source derived, of taxes paid relating to a taxable year of an ACQUIRED ASSOCIATION which ends on or prior to the Effective Date, including, but not limited to, a refund of state or local taxes, plus any interest received by the ACQUIRING ASSOCIATION on such refund to the extent any such refund has not been accrued prior to the Effective Date as determined pursuant to the Initial Audit. The net tax refund shall be equal to the total refunds received in a particular year, plus interest received on such refunds, less the Federal, state, or local tax liability payable with respect to such refunds and interest and less any administrative expenses incurred by the ACQUIRING ASSOCIATION in obtaining such refunds. The Federal, state and local tax liability associated with such refunds and interest shall be the difference between the actual tax liability payable by reason of the inclusion of such refunds and interest in gross income and the tax liability which would have been payable if such refunds and interest had not been includible in gross income;

(7) *Audit Expense.* Fifty percent (50%) of the cost of preparing the Limited Audit and the inventory required by § [illegible] of this Agreement, *provided* that the Initial Audit and the inventory are completed within 120 days of the date hereof.

(8) *Excess Yield.* (A) With respect to the Covered Assets for which the CORPORATION provided a yield subsidy pursuant to § (3)(a)(10) for any given Quarter, the amount of any excess of actual yield for such Quarter over the Guaranteed Yield Amount for such Quarter and (B) any amount due pursuant to § 3(a)(10)(D).

(9) *Uncollected Interest.* The amount of uncollected interest written off in accordance with

§ 3(a)(9), but subsequently collected by the ACQUIRING ASSOCIATION;

(10) *Recoveries on Acquired Association Claims and Related Claims.* Any amount received or benefit realized by the ACQUIRING ASSOCIATION or, where appropriate, the ACQUIRER, STATESMAN or AMERICAN LIFE, upon Liquidation of any Acquired Association Claim or Related Claim as provided in § 7(d) and § 8(c) of this Agreement to the extent such recoveries do not exceed contributions by the CORPORATION under this Agreement.

(11) *CORPORATION's Contribution.* Contributions made by the CORPORATION to eliminate a Debit balance in the Special Reserve Account.

(12) *Federated Financial Loan Recoveries.* Eighty-five percent (85%) of (i) any amount by which the Net Proceeds Received by the ACQUIRING ASSOCIATION upon the Liquidation of a Federated Financial Loan exceeds the value of such loan reflected by the books and records of Federated Financial immediately prior to the Effective Date, as adjusted to the extent allowable under the applicable rules and procedures of the appropriate governmental or private mortgage insurer of such loan, and of (ii) any Net Proceed Received on a deficiency judgment or other Claim related to a Federated Financial Loan.

(13) *Tax Benefits.*

(A) The amount of the net tax benefits, if any, realized by any consolidated group of which the ACQUIRER or the ACQUIRING ASSOCIATION is a member ("Taxable Party"), in any year ("Net Tax Benefits") calculated as provided in this § 3(c)(13). For purposes of this Agreement, the Net Tax Benefits shall be the tax benefits that are attributable to the items described below ("Tax Benefit Items") that are utilized by the Taxable Party to reduce its tax liability

in a given tax year as calculated in paragraph (B) below: Any federal, state or local income tax deductions or losses actually taken by the Taxable Party with respect to net operating losses of any of the ACQUIRED ASSOCIATIONS through the Effective Date. Such net operating losses shall be deemed to be actually taken when used by the Taxable Party to reduce its tax liabilities that were incurred during the taxable year of the ACQUIRED ASSOCIATIONS ending on the Effective Date.

(B) The Net Tax Benefits for a taxable year shall be equal to:

(i) fifty (50%) percent of the excess, of any, of

(AA) the federal, state and local income tax liability for such taxable year (taking into account all allowable carryovers and carrybacks to such taxable year) which would have been imposed on the Taxable Party if the deductions or losses described in § 3(c)(13)(A) had not been deducted in any taxable year over

(BB) the federal, state and local income tax liability for such taxable year (taking into account all allowable carryovers and carrybacks to such taxable year) actually imposed on the Taxable Party;

(C) The Net Tax Benefits shall be credited to the Special Reserve Account or paid in cash, pursuant to § 3(c)(11)(G) of this Agreement, at the time of filing of the federal income tax return of the Taxable Party for the taxable year in which said Net Tax Benefits are realized (including by any of carryovers and carrybacks);

(D) In the event Net Tax Benefits are credited or paid with respect to Tax Benefit Items that are subsequently disallowed or that cease to be Tax Benefit Items because it is determined that payments with respect to deductions and losses otherwise

described in § 3(c)(13)(A) were not excludable from gross income, such Net Tax Benefits shall be debited to the Special Reserve Account or shall be paid by the CORPORATION or the ACQUIRING ASSOCIATION as set forth in § 3(c)(13)(F);

(E) Each of the ACQUIRER and the ACQUIRING ASSOCIATION shall, upon request of the CORPORATION, provide copies of the tax returns and amended tax returns of itself and of the consolidated group, if any, of which it is a member, for any taxable year(s) that are specified by the CORPORATION and relevant to the determination of the Credit to the Special Reserve Account or payments required to be made to the CORPORATION pursuant to this section;

(F) Repayments or payments by the CORPORATION required by this § 3(c)(13) shall be effected by a Debit to the Special Reserve Account, if made prior to the Termination Date, and by a cash payment or wire transfer within ten days after the CORPORATION's receipt of written demand for payment, if made after the Termination Date; *provided*, that in either case the CORPORATION shall receive a full written explanation of the basis for its payment obligation; and *provided further*, that the ACQUIRER or the ACQUIRING ASSOCIATION or each of them, as the case may be, has compiled with § 12(f) with respect to the Tax Benefit items or Net Tax Benefits that are subject to adjustment;

(G) The provisions of this § 3(c)(11) shall survive the Termination Date. After the Termination Date, each of the ACQUIRER and the ACQUIRING ASSOCIATION shall pay to the CORPORATION by cash payment or wire transfer amounts equal to all the Net Tax Benefits that prior to the Termination Date would have been credited to the Special Reserve Account.

(14) *Income Payment Credits.* Any amount permitted [illegible] be credited to the Special Reserve Account pursuant to § 6(d).

Section 4. *Write-Down of a Covered Asset.*

(a) Approval of Write-Down. The ACQUIRING ASSOCIATION shall not write down any Covered Asset without first obtaining the CORPORATION's written consent pursuant to the terms of this § 4, and shall undertake to liquidate each Covered Asset in accordance with the terms of this Agreement prior to applying to the CORPORATION for such consent. In the event that the ACQUIRING ASSOCIATION proposes to write down a Covered Asset, the ACQUIRING ASSOCIATION shall first apply to the CORPORATION for permission to write down a Covered Asset by submitting to the CORPORATION in writing the terms, including the amount, of the proposed write-down, and the grounds for the ACQUIRING ASSOCIATION's opinion that the Covered Asset should be written down, supported by such information or documents as the CORPORATION may reasonably request.

(b) *Determination of Write-Down.* With respect to any Covered Asset, any write-down shall be determined as follows:

(1) The CORPORATION may require the ACQUIRING ASSOCIATION to write down the Book Value of any Covered Asset; and such amount of the resulting Covered Asset Loss shall be debited to the Special Reserve Account as provided in § 3(a)(1); or

(2) Within thirty (30) days of the CORPORATION's receipt for an application from the ACQUIRING ASSOCIATION setting with the grounds for the ACQUIRING ASSOCIATION's opinion that the value of a Covered Asset is less than its Book Value, and such information or documents as the CORPORATION may request, the CORPORATION shall:

(A) approve the application, with or without modifications or conditions, and permit the ACQUIRING ASSOCIATION to write down the Covered Asset's Book Value and Debit such amount of the resulting Covered Asset Loss to the Special Reserve Account as provided in § 3(a)(1);

(B) deny the application (the basis for such denial shall not be unreasonable), in which case the CORPORATION shall direct the ACQUIRING ASSOCIATION to take such action with respect to the Covered Asset as, in the exercise of reasonable judgment, the CORPORATION deems necessary or appropriate; or

(C) require the ACQUIRING ASSOCIATION to submit additional information, including, but not limited to, an independent appraisal. Within thirty (30) days after the CORPORATION's receipt of any additional information requested, the CORPORATION shall approve, with or without modifications or conditions, or deny such application, in which case the CORPORATION shall direct action by the ACQUIRING ASSOCIATION as provided by paragraph (B) above.

(c) *Required Sale.* The CORPORATION may at any time require the ACQUIRING ASSOCIATION to sell any Covered Asset to any person or entity the CORPORATION designates, including the CORPORATION, at a price specified pursuant to § 13 of this Agreement, *provided*, that the CORPORATION can not require the ACQUIRING ASSOCIATION to provide financing to such person or entity.

(d) *Adjustment at Termination.* As of the Termination Date of this Agreement, the ACQUIRING ASSOCIATION shall adjust, if necessary, the Book Value of each Covered Asset remaining on its books to the value of such asset as determined by agreement

between the ACQUIRING ASSOCIATION and the CORPORATION or by an appraisal acceptable to both the ACQUIRING ASSOCIATION and the CORPORATION. Such agreement may be made or such appraisals may be obtained at any time beginning on the date which is four years and six months from the Effective Date. The amount of any adjustment of the Book Value of any Covered Asset pursuant to this § 4(d) shall be deemed, for purposes of this Agreement, a Covered Asset Loss or a Covered Asset Recovery, respectfully, prior to the Termination Date. An appraisal pursuant to this § 4(d) shall be performed by an appraiser selected by the ACQUIRING ASSOCIATION and acceptable to the CORPORATION. In the event either party objects to an appraisal prepared by such an appraiser, such party shall submit its objections in writing to the other party. Such objections shall be specific and shall be based upon the Bank Board's appraisal policies then in effect. Following any such objections, the parties can request the appraiser to revise his appraisal in light of such objections or can select a new appraiser in the same manner as the initial appraiser was selected; *provided* that any new appraisal requested by the Acquiring Association shall be performed at the ACQUIRING ASSOCIATION's expense. Any revised or new appraisal shall be subject to approval by both parties on the same basis.

Section 5. *Initial Audit and Inventory.* As soon as is practicable after the Effective Date, the CORPORATION with the assistance of the ACQUIRING ASSOCIATION's personnel, whose salaries and expenses shall be paid by the ACQUIRING ASSOCIATION without reimbursement from the CORPORATION, shall cause to be prepared and completed by Coopers & Lybrand.

(a) an Initial Audit of each ACQUIRED ASSOCIATION as of immediately prior to the Effective Date, to be performed in accordance with generally accepted auditing standards, except that the scope of the Initial Audit shall be determined by the CORPORATION consistent with this Agreement and shall not include a revaluation of any ACQUIRED ASSOCIATION's assets, other than single family residential properties constituting REO (selected on a sampling basis), or a determination whether accrued but uncollected interest, if any, is collectible; and

(b) an inventory of all assets and liabilities required by the ACQUIRING ASSOCIATION as of the Effective Date under the Acquisition Agreement and the Merger Agreements. Such inventory shall be limited to such assets and liabilities as are shown on the books and records of the ACQUIRED ASSOCIATIONS immediately prior to the Effective Date, or which are reasonably ascertainable during the preparation of the inventory. A copy of the Initial Audit and the inventory, in such forms as the CORPORATION shall determine, shall be furnished to the ACQUIRING ASSOCIATION upon completion and approval by the CORPORATION.

Section 6. *Payments and Contributions.*

(a) *Initial Contributions by the CORPORATION.*

(1) *Cash Contribution.* If the conditions set forth in § 2 of this Agreement have been satisfied, within five business days after the Effective Date, the CORPORATION shall wire transfer to the account of the ACQUIRING ASSOCIATION at the Bank immediately available funds in an amount equal to $60 million or approximately fifty-eight percent (58%) of the estimated combined Negative Regulatory Capital of all of the ACQUIRED ASSOCIATIONS immediately prior to the Effective Date, which the parties

agree equals $103 million ("Estimated Negative Regulatory Capital").

For the purposes of reports to the Bank Board, other than reports or financial statements prepared for reporting or disclosure purposes that are required to be governed by GAAP, $26 million of the contribution made under this § 6(a)(1) shall be credited to the ACQUIRING ASSOCIATION's regulatory capital account and shall constitute regulatory capital (as defined in § 561.13 of the Insurance Regulations). The parties understand that the preceding sentence is not intended to address in any way the accounting treatment of contributions from the CORPORATION that must be reflected in any filing that the ACQUIRING ASSOCIATIONS may make, whether to the Bank Board (for reporting or disclosure purposes) or otherwise, that requires the submission of financial statements prepared in accordance with GAAP.

(2) *Promissory Note.* If the conditions set forth in § 2 of this Agreement have been satisfied, on the Effective Date the CORPORATION shall deliver to the ACQUIRING ASSOCIATION the Note, duly executed by the CORPORATION, the principal amount which shall be equal to the difference between the Estimated Negative Regulatory Capital and the amount of cash contributed to the ACQUIRING ASSOCIATION within five business days after the Effective Date pursuant to § 6(a)(1) above. Promptly

THIS PAGE INTENTIONALLY LEFT BLANK

after the CORPORATION's receipt and approval of the Initial Audit referred to in § 5(a):

(i) the Corporation shall increase, as of the Effective Date, the principal balance of the Note by the amount, if any, by which the combined Negative Regulatory Capital of all of the ACQUIRED ASSOCIATIONS immediately prior to the Effective Date, as reflected by the Initial Audit, exceeds the amount of Estimated Negative Regulatory Capital and shall pay, at the next Interest Payment Date (as defined in the Note), following such increase, all interest on the amount of such increase accrued from the Effective Data through the Interest Payment Period (as defined in the Note) immediately preceding such Interest Payment Date; or

(ii) the Corporation shall decrease, as of the Effective Date, the principal balance of the Note by the amount, if any, by which the amount of Estimated Negative Regulatory Capital exceeds the combined Negative Regulatory Capital of all of the ACQUIRED ASSOCIATION immediately prior to the Effective Date, as reflected by the Initial Audit, and the amount of accrued interest on the Note due and payable on the next Interest Payment Date following such decrease shall be reduced by the amount of interest on the amount of such increase which has been accrued or paid through the Interest Payment Period immediately preceding such Interest Payment Date.

(b) *Debit Balance.* Within thirty (30) days after receipt of each Quarterly Report required pursuant to § 11(a) of this Agreement or within ninety (90) days of the final accounting required pursuant to § 11(c) of this Agreement, the CORPORATION will contribute to the ACQUIRING ASSOCIATION, by deposit into the ACQUIRING ASSOCIATION's account at the Bank, an amount equal to the Debit balance of the Special

Reserve Account that is not offset by Credits due to the CORPORATION calculated as of the last day of the applicable Quarter or as of the Termination Date. After the Termination Date, amounts payable to the ACQUIRING ASSOCIATION by the CORPORATION pursuant to §§ 7 and 8 of this Agreement shall be paid in a like manner.

(c) *Contributions Resulting from Assignment of Claims.* The amount of any payment made by the CORPORATION in excess of the fair market value of any Acquired Association Claim or Related Claim assigned to the CORPORATION pursuant to § 8, shall be deemed to be a contribution by the CORPORATION. Fair market value may be determined, at the election of the CORPORATION, by Agreement of the CORPORATION and the ACQUIRING ASSOCIATION, or by an appraisal by an independent appraiser by the CORPORATION and the Acquiring Association, the cost of which appraisal shall be paid by the CORPORATION.

(d) *Income Payments.*

(1) The ACQUIRING ASSOCIATION shall pay to the FSLIC 9% of its Gross Book Income for the first two fiscal years following the Effective Date and 18% of its Gross Book Income for the fiscal years and any portion thereof from and including the third fiscal year through the 10th anniversary of the Effective Date. Any payments due hereunder shall be credited to the Special Reserve Account if the Gross Book Income is determined prior to the termination of this Agreement and shall be paid in immediately available funds if the Gross Book Income is determined after the termination of this Agreement.

(2) Notwithstanding the foregoing, in the event the ACQUIRING ASSOCIATION's Gross Book Income for any year equals to exceeds $5 million, then

the ACQUIRING ASSOCIATION shall assign and transfer to the FSLIC 20,000 shares of Statesman Preferred Stock having an initial book value of $2.0 million for such a year, and the transfer of Preferred Stock in each such year shall be in lieu of payments which would otherwise be paid under § 6(d)(1) for each such year.

(3) In the event, pursuant to § 6(d)(2), the FSLIC receives in the aggregate 100,000 shares of Statesman Preferred Stock having a book value of $10 million, the ACQUIRING ASSOCIATION shall have no further obligations to make any credits, payments or transfers pursuant to this § 6(d).

(4) Credits, payments or transfers pursuant to this § 6(d) shall be made as soon after the end of the applicable fiscal year or, in the case of the portion of a fiscal year ending on the tenth anniversary of the Effective Date, as soon after the end of such portion, as the Gross Book Income for such fiscal year or portion thereof, but in no event later than 90 days after the end of such fiscal year or portion thereof.

(5) For purposes of this § 6(d), the term Gross Tax Income shall mean net income in accordance with GAAP but without any deduction for any payments made on the subordinated debenture issued to the CORPORATION pursuant to § 6(e). For purposes of this § 6(d) "Statesman Preferred Stock" shall mean 1988 Series I Convertible Preferred Stock of STATESMAN bearing a dividend rate of 8%.

(e) *Issuance of Subordinated Debenture.* On the Effective Date, the ACQUIRING ASSOCIATION shall issue and deliver to the CORPORATION a subordinated debenture, in the form or substantially in the form of Exhibit B attached hereto, with a face amount of $5.0 million and a term of ten years.

(f) *Reimbursement of Credit Balances.*

(1) Within thirty (30) days after the CORPORATION's receipt of each Quarterly Report required pursuant to § 6(a) of this Agreement, the ACQUIRING ASSOCIATION shall, for itself and the ACQUIRER, remit to the CORPORATION an amount equal to the aggregate amount of the net Credit Balance of the Special Reserve Account as of the last day of the Quarter reported in the Quarterly Report; *provided*, that if such amount exceeds the total of the contributions made by the Corporation to date and not repaid, then the ACQUIRING ASSOCIATION shall remit to the Corporation only so much of such amount as equals the total of the contributions, and the excess, if any, shall remain as a credit balance in the Special Reserve Account.

(2) Within ninety (90) days after rendering its final accounting required under § 11(c) of this Agreement, the ACQUIRING ASSOCIATION shall, for itself and the ACQUIRER, STATESMAN and AMERICAN LIFE, remit to the CORPORATION an amount equal to the aggregate net Credit balance in the Special Reserve Account as of the Termination Date; *provided*, that the amount so remitted shall not exceed the total contributions made by the CORPORATION under this Agreement and not repaid.

(g) *Optional Purchase of Covered Assets.* In the event that the CORPORATION exercises its right to purchase a Covered Asset pursuant to § 13 or § 15 of this Agreement, the excess, if any, of the purchase price paid by the CORPORATION over the fair market value of such asset shall be deemed to be a contribution to the CORPORATION. Fair market value shall be determined, at the election of the CORPORATION, by agreement of the CORPORATION and the ACQUIRING ASSOCIATION, or by

an independent appraisal accepted by the CORPORATION and the ACQUIRING ASSOCIATION.

(h) *Adjustments.* Any contribution or payment by the CORPORATION or the ACQUIRING ASSOCIATION pursuant to this Agreement, any Credit or Debit to the Special Reserve Account, or any accounting or report furnished by the ACQUIRING ASSOCIATION under this Agreement shall be subject to adjustment if it subsequently is determined that such contribution, payment, Credit, Debit, accounting, or report was based upon error or upon a tax determination that has been subsequently adjusted, or was not computed in accordance with the accounting principles prescribed in this Agreement, or, without the approval of the CORPORATION and the ACQUIRING ASSOCIATION, was otherwise inconsistent with the terms of this Agreement.

(i) *Repayment.* In the event that a court of competent jurisdiction directs the ACQUIRING ASSOCIATION to divest itself of the assets it acquired and the liabilities it assumed from any ACQUIRER ASSOCIATION or directs the ACQUIRER to divest itself of the stock of the ACQUIRING ASSOCIATION, the contribution made pursuant to §§ 6(a), § 6(c) and § 6(g) and all amounts debited to the Special Reserve Account pursuant to §§ 3(a)(1), (2) and (9) less all amounts credited to the Special Reserve Account pursuant to §§ 3(c)(1), (4), and (9) shall be repaid to the CORPORATION by the ACQUIRING ASSOCIATION; *provided*, that amounts credited or debited to the Special Reserve Account shall be included in the calculation required by this § 6(i) only to the extent such Debits or Credits relate to periods for which payments have been made, or no payments were required to be made pursuant to § 6(b) or § 6(f), and *further provided*, that no such payments will be made

until after the Acquirer has fully recovered its capital investment in the ACQUIRING ASSOCIATION, and the Acquirer and the Acquiring Association have fully recovered all of their reasonable out-of-pocket expenses to unaffiliated third parties incurred by them or on their behalf on or after the Effective Date in connection with the Acquisition and the Mergers.

Section 7. *Indemnification.* To the extent not otherwise reimbursed or Reimbursable, the CORPORATION will indemnify the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN or AMERICAN LIFE for, and pay, as provided in this § 7, the amounts actually paid by the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN or AMERICAN LIFE or all of them in connection with the satisfaction, settlement, or compromise of the following liabilities, Claims and challenges to the Acquisition and the Mergers (except that the ACQUIRING ASSOCIATION, but not the ACQUIRER, STATESMAN or AMERICAN LIFE, shall be indemnified as to liabilities described in § 7(a) below); the reasonable costs and expenses of litigation related to such liabilities, Claims and challengers to the Acquisition and the Mergers, including reasonable attorneys' and accountants' fees, travel expenses, court costs and related litigation expenses; and such other actual and reasonable costs as may be actually incurred and payable by the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN or AMERICAN LIFE in connection with such satisfaction, settlement, or compromise, or defense of such liabilities, Claims or challenges ("Indemnifiable Losses"); *provided*, that the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN and AMERICAN LIFE comply with the covenants set forth in § 12; and *provided further*, that such costs and expenses shall be subject to

approval by the CORPORATION which shall not be unreasonably withheld as being related to matters subject to indemnification under this § 7; and *provided further*, that the reports required by § 11(a) and (f) of this Agreement, in a form satisfactory to the CORPORATION, shall be submitted to the CORPORATION before such costs and expenses will be paid by the CORPORATION pursuant to § 6(b) of this Agreement; and *provided further*, that the CORPORATION will indemnify the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN or AMERICAN LIFE for such amounts as relate to liabilities or Claims described in this § 7 and respect to any subsidiary (other than Federated Financial) only to the extent of an ACQUIRED ASSOCIATION's investment in such subsidiary as of the Effective Date.

(a) *Undisclosed Liabilities.* Except as provided in this § 7(a), and liabilities of any ACQUIRED ASSOCIATION or any subsidiary thereof (other than Federated Financial) to the extent such liabilities were not fully disclosed in, or fully reflected as a liability on, the books and records of any ACQUIRED ASSOCIATION or its subsidiaries immediately prior to the Effective Date and which, under GAAP as of the Effective Date consistently applied, are of the type that are reserved for, disclosed, or reflected as liabilities, but excluding any inadequacy in or lack of an asset valuation allowance or specific reserve; *provided* that, in the event that the satisfaction, settlement, or compromise of any liability or liabilities described in this § 7(a) results in the acquisition by the ACQUIRING ASSOCIATION of an asset or assets, then at the CORPORATION's election:

(1) The ACQUIRING ASSOCIATION shall assign such asset or assets to the CORPORATION without cost to the CORPORATION; or

(2) The amount paid by the CORPORATION pursuant to this § 7(a) shall be limited to the amount, if any, by which the amounts paid by the ACQUIRING ASSOCIATION in connection with the satisfaction, settlement, or compromise of such liability or liabilities exceed the fair market value of the asset or assets, if any, acquired as a consequence of the satisfaction, settlement, or compromise of such liability or liabilities as determined by agreement between the ACQUIRING ASSOCIATION and the CORPORATION, or by an appraisal mutually approved by the CORPORATION and the ACQUIRING ASSOCIATION and performed by an independent appraiser acceptable to the CORPORATION, the cost of which appraisal shall be paid by the CORPORATION.

The CORPORATION's obligation to provide indemnification under this § 7(a) shall not extend to liabilities of any ACQUIRED ASSOCIATION or its subsidiaries incurred prior to the Effective Date which normally recurred in such ACQUIRED ASSOCIATION's or its subsidiaries' ordinary course of business and operations, which are ordinary posted on the books and records of such ACQUIRED ASSOCIATION or its subsidiaries on a periodic basis, and which are in amounts that are materially the same as and can reasonably be predicted from prior postings on the books and records of such ACQUIRED ASSOCIATION or its subsidiaries concluding, but not limited to, items such as accrued employee salaries, utility bills, accrued interest due to depositors and accountholders, and accrued interest payable to the Bank or the Federal Home Loan Bank of Atlanta, or any other lender to such ACQUIRED ASSOCIATION; *provided* that, with respect to accrued interest payable to a lender, the underlying obligation to pay principal is reflected on the books and records of any ACQUIRED ASSOCIATION.

(b) *Unreserved for Claims.* Any Claim against any ACQUIRED ASSOCIATION, the ACQUIRING ASSOCIATION as its successor, the ACQUIRER, STATESMAN, AMERICAN LIFE or any subsidiary of an ACQUIRED ASSOCIATION (other than Federated Financial), based upon an action or failure to act on the part of such ACQUIRED ASSOCIATION or such subsidiary prior to the Effective Date, whether dated before or after the Effective Date, to the extent that such Claim:

(i) was not adequately reserved for or adequate provision was not made for its payment on the books and records of such ACQUIRED ASSOCIATION or such subsidiary prior to the Effective Date as reflected in the Initial Audit; and

(ii) is not Reimbursable under any insurance equity, bond, or other provision for funding.

(c) *Challenges to the Acquisition or the Mergers.* Any action brought by any person other than the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN or AMERICAN LIFE, or any Affiliate, subsidiary, service corporation, accountholder, stockholder (if any), or creditor of any of them, within one year following the Effective Date to challenge or set aside the Acquisition or any merger, in whole or in part, or this Agreement, that is grounded from a claim that an action or failure to act by the Bank Board or the CORPORATION was not in accordance with the Bank Board's or the CORPORATION's enabling legislation, and, in the event that a court of competent jurisdiction, by final order, directs the ACQUIRING ASSOCIATION to divest itself of any MERGED ASSOCIATION of the assets and liabilities of the CLOSED ASSOCIATION on such ground, the capital investment of the ACQUIRER in the ACQUIRING ASSOCIATION and the reasonable, out-of-pocket

expenses of unaffiliated third parties incurred by the ACQUIRER or the ACQUIRING ASSOCIATION or on behalf of either of them on or after the Effective Date in connection with the Acquisition and the Mergers; *provided*, that such reasonable costs and expenses are attributable to such action or failure to act by the Bank Board of the CORPORATION, and *provided further*, that the ACQUIRER and the ACQUIRING ASSOCIATION are unable to recover such amounts, despite good faith efforts, in the divestiture.

(d) *Pursuit of Related Claims.* The ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN and AMERICAN LIFE shall, in accordance with the management standards described in § 12(a) of this Agreement, use their best efforts to reimburse, reduce or minimize the CORPORATION's indemnity payments under § 7 or § 12(d)(7) and any contribution under § 6(a) or (b), by the pursuit of Related Claims, whether discovered before or after the Effective Date. The CORPORATION shall indemnify and pay, as provided in this § 7(d) of this Agreement, the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN or AMERICAN LIFE for reasonable and related costs and expenses, incurred in connection with the prosecution of a Related Claim, including, but not limited to, reasonable attorneys' and accountants' fees, travel expenses, court costs and related litigation expenses, but only to the extent that such actual and reasonable costs and expenses are not otherwise reimbursed or Reimbursable; *provided*, that the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN and AMERICAN LIFE comply with the covenants set forth in § 12 of this Agreement; and *provider further*, that the pursuit of Related Claims shall be subject to approval by the CORPORATION

and the reports required § 11(a) and (f) of this Agreement, in forms satisfactory to the CORPORATION, shall be submitted to the CORPORATION before costs and expenses related to the pursuit of Related Claims shall be paid by the CORPORATION. All sums recovered on each of such Related Claims in excess of the value of such Related Claims reflected on the books and records of the ACQUIRED ASSOCIATIONS immediately prior to the Effective Date, as adjusted by the Initial Audit and as thereafter adjusted or determined in accordance with the accounting principles required by this Agreement, shall be credited to the Special Reserve Account pursuant to § 3(c)(10) of this Agreement. Any such sums recovered after the Termination Date shall be paid over to the CORPORATION to the extent that the CORPORATION has made contributions pursuant to this Agreement, and otherwise shall be retained by the ACQUIRING ASSOCIATION.

(e) *Payments as Contributions.* All payments made by the CORPORATION to the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN or AMERICAN LIFE under this § 7 shall be considered contributions under this Agreement.

(f) *Limitations on Indemnification and Federated Financial Loan Losses.*

(1) The indemnification provided for in this § 7 with respect to Federated Financial shall be limited to Indemnifiable Losses arising from or related to the pending results and litigation threatened in a writing delivered to Federated Financial or to the CLOSED ASSOCIATION prior to the Effective Date.

(2) The ACQUIRING ASSOCIATION may charge as a Debit to the Special Reserve Account pursuant to § 3(a)(3) of this Agreement the amount of any Indemnifiable Loss arising from it related to the

lawsuits or threatened litigation identified in § 7(f)(1) hereto or liabilities of and Claims against the ACQUIRING ASSOCIATION in any way based on activities of Federated Financial, or charge as a Debit to the Special Reserve Account pursuant to § 3(a)(13) of this Agreement the amount of any Federated Financial Loan Loss; *provided* that the total amount of any such debits authorized by this § 7(f)(2) shall not exceed $15 million in the aggregate.

(3) The CORPORATION's obligation to provide indemnification under this § 7 shall not extend beyond five years near the Effective Date, subject to the provisions of §§ 7(c) and 19 of this Agreement.

Section 8. *Acquired Association Claims and Related Claims.*

(a) The ACQUIRING ASSOCIATION shall in good faith and accordance with the management standard described in § 7(a)(1) of this Agreement exercise its best efforts in pursuing and filing actions on all potentially recoverable Acquired Association Claims, whether discovered before or after the Effective Date. Provided that the ACQUIRING ASSOCIATION complies with the covenants set forth in § 12, the CORPORATION will indemnify the ACQUIRING ASSOCIATION for all reasonable costs the expenses actually incurred and payable by the ACQUIRING ASSOCIATION in connection with the prosecution of an Acquired Association Claim, including, but not limited to, reasonable attorneys' and accountants' fees, travel expenses, court costs and related expenses in connection with such prosecution, but not to the extent that such costs and expenses are not otherwise Reimbursed or Reimbursable; *provided further*, that the prosecution of an Acquired Association Claim shall be subject to approval by the CORPORATION and the reports required by this Agreement, in a form

satisfactory to the CORPORATION, shall be submitted to the CORPORATION before costs and expenses related to the prosecution of an Acquired Association Claim shall be paid by the CORPORATION. Any amount paid by the CORPORATION pursuant to this subsection shall be considered to be a contribution by the CORPORATION to the ACQUIRING ASSOCIATION.

(b) At any time during the term of this Agreement and until the later of ninety (90) days after the Termination Date, or termination of the CORPORATION's obligation to provide assistance pursuant to §§ 16 or 19 of this Agreement, the CORPORATION shall have the right to obtain from the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN and AMERICAN LIFE, where appropriate, an Assignment of any Acquired Association Claim or Related Claim or the Net Proceeds Received from the Liquidation of any such Claim. If an Acquired Association Claim or Related Claim had a value reflected on the books and records of any MERGED ASSOCIATION immediately prior to the Effective Date, the CORPORATION shall [illegible] for such assignment that value, as adjusted by the Initial Audit and as thereafter adjusted or determined in accordance with the accounting principles required by this Agreement. The purchase price shall be debited to the Special Reserve Account pursuant to § 3(a)(8) of this Agreement as of the assignment date, if the transfer occurs prior to the Termination Date, or shall be paid in cash to the ACQUIRING ASSOCIATION by the CORPORATION within ten (10) days after completion of such assignment if assignment occurs after the Termination Date. In order to facilitate the transfer of any Acquired Association Claim or Related Claim, the ACQUIRING ASSOCIATION, the ACQUIRER,

STATESMAN and AMERICAN LIFE, where appropriate, shall, at the CORPORATION's request:

(1) Execute and deliver such instruments of assignment or transfer and make endorsements in such form and manner, and at such times, as the CORPORATION requires;

(2) Execute and deliver all other instruments that the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN and AMERICAN LIFE possess and the CORPORATION deems necessary to complete such assignment or transfer; and

(3) Deliver to the CORPORATION all documents and manner materials in their possession or control, and use their best efforts to obtain any further information that the CORPORATION deems necessary to prosecute effectively any Acquired Association Claim or Related Claim.

(c) If the ACQUIRING ASSOCIATION has recovered on an Acquired Association Claim, the Net Proceeds Received upon the Liquidation of such Claim, in excess of the value, if any, of such Claim reflected on the books and records of the ACQUIRED ASSOCIATION on or prior to the Effective Date, as adjusted by the Initial Audit and as thereafter adjusted or determined in accordance with the accounting principles required by this Agreement, shall be credited to the Special Reserve Account pursuant to § 3(c)(10) of this Agreement. Recoveries on Related Claims by the ACQUIRING ASSOCIATION shall be similarly credited, as provided in § 7(d) of this Agreement.

(d) If the CORPORATION has recovered on an Acquired Association Claim or Related Claim that has been assigned to the CORPORATION, the Net Proceeds Received upon the Liquidation of such Claim shall be retained by the CORPORATION to the

extent of the amount, if any, paid by the CORPORATION for the assignment of such claims and to the extent of any other contributions made by the CORPORATION pursuant to this Agreement.

(e) Any recoveries by the CORPORATION on Acquired Association Claims or Related Claims exceeding the aggregate amount to be retained by the CORPORATION pursuant to § 8(d) of this Agreement shall be debited to the Special Reserve Account pursuant to § 3(a)(8) of this Agreement.

(f) The ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN or AMERICAN LIFE shall promptly notify the CORPORATION of any evidence that they discover indicating a basis for an Acquired Association Claim or Related Claim, and covenant to use their best efforts, cooperate fully and take all such actions as are necessary to assist the CORPORATION in the pursuit of such Claims assigned to the CORPORATION pursuant to this Agreement.

Section 9. *Duplicate Payments.* Any cost or expense for which the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN or AMERICAN LIFE has been reimbursed under any section of this Agreement, or any recovery which has been paid over to or retained by the CORPORATION under any section of this Agreement, shall not also be reimbursed to the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN or AMERICAN LIFE or paid over to or retained by the CORPORATION, under any other section of this Agreement, even though such cost, expense, or recovery may be described in whole or in part in two or more sections of this Agreement.

Section 10. *Non-Reimbursable Expenses.* The ACQUIRING ASSOCIATION shall not seek reimbursement from the CORPORATION for expenses incurred

in the administration of this Agreement. For purposes of this § 10, such expenses shall include, but shall not be limited to, compensation paid to employees or agents of the ACQUIRING ASSOCIATION for services performed in connection with the preparation of reports and supporting documentation required to be filed with the CORPORATION under § 11 of this Agreement.

Section 11. *Reports, Records.* In the event of the failure of the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN or AMERICAN LIFE, where appropriate, to comply with any of the following requirements, the CORPORATION may delay payment of a related charge for reimbursement under this Agreement until, in the CORPORATION's reasonable judgment, the ACQUIRING ASSOCIATION meets such requirement.

(a) *Quarterly Reports.* Within thirty (30) days following the end of each Quarter, the ACQUIRING ASSOCIATION shall furnish a report or reports to the CORPORATION, in a format approved by the CORPORATION and supported by such data as, in the CORPORATION's judgment, may be necessary for verification, which report or reports shall include:

(1) an accounting of all Debits and Credits to the Special Reserve Account;

(2) itemization of payments made by and due from the CORPORATION, which, with respect to charges by the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN or AMERICAN LIFE for reimbursement of attorneys' and accountants' fees pursuant to § 7 of this Agreement, shall be supported by the following documentation and by such other documentation as the CORPORATION may request:

(A) Copies of itemized statements of charges received by the ACQUIRING ASSOCIATION, the

ACQUIRER, STATESMAN or AMERICAN LIFE from each law firm and accounting firm, specifying with respect to each Claim, undisclosed liability, cause of action challenging the Acquisition or any Merger, or other matter for which reimbursement is sought:

(i) the nature and resulting work product of each service performed by each attorney and accountant;

(ii) the identify of the person who performed each service;

(iii) the date on which each service was performed;

(iv) the hourly rate charged for each service; and

(v) the total number of hours billed such services; and

(B) Copies of any letters, contracts, or other documents that set forth the agreement between the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN or AMERICAN LIFE and such law firms and accounting firms concerning the basis on which fees and other compensation due such attorneys and accountants from the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN or AMERICAN LIFE are to be computed.

(3) A statement of payments made by or due from the ACQUIRING ASSOCIATION under this Agreement.

(4) Status reports on all current and potential claims and liabilities, with litigation evaluation reports current within thirty (30) days, that may result in a Debit or Credit to the Special Reserve Account, other than litigation in connection with an uncontested Foreclosure action.

(b) *Reports on Covered Assets.* The ACQUIRING ASSOCIATION shall submit to the CORPORATION

reports concerning Covered Assets that fall within the categories described below. Such reports shall be in a form mutually satisfactory to the CORPORATION and the ACQUIRING ASSOCIATION and shall be submitted within thirty (30) days of the end of each Quarter during the term of this Agreement, unless for good cause the CORPORATION extends the time for submission of any report:

(1) loans, delinquent more than ninety (90) days or loans to be foreclosed, showing date of commencement of foreclosure;

(2) the anticipated date of the Foreclosure sale for all loans on which Foreclose has commenced; and

(3) Real Estate Owned, showing the anticipated disposition of such, including listing prices and sales methods.

(c) *Final Accounting.* Within ninety (90) days after the date this Agreement terminates, or such longer time as the CORPORATION may permit, the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN and AMERICAN LIFE shall render to the CORPORATION a final accounting, and shall include such information and be in such form as the CORPORATION shall request.

(d) *Access to Books and Records.* The ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN and AMERICAN LIFE shall make available to the CORPORATION all books, papers, records, and information of any kind relating to any or all matters subject to the provisions of this Agreement, including any such materials or information in the possession of the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN, AMERICAN LIFE or any of their Affiliates, subsidiaries, service corporations, agents, or counsel.

(e) *Audits and Examinations.* The CORPORATION may audit or examine the ACQUIRING

ASSOCIATION, the ACQUIRER, STATESMAN, AMERICAN LIFE or any of their Affiliates, service corporations, or subsidiaries, with respect to transactions affecting the implementation of this Agreement at any time upon reasonable notice. Such audits shall be conducted by the CORPORATION at its own expense but, it requested by the CORPORATION, with the assistance of the personnel of any of the parties hereto whose salaries and expenses shall be paid by the appropriate carry without reimbursement from the CORPORATION.

(f) *Reports Concerning Prosecution of Claims by Court Action and Settlement of Claims and Liabilities.*

(1) In requesting the CORPORATION's written consent, pursuant to § 12(a) of this Agreement, to engage attorneys or accountants the cost of whose services may be debited to the Special Reserve Account, or otherwise to incur expenses which may be debited to the Special Reserve Account under § 3(a)(3) of this Agreement in connection with the pursuit of a Related Claim, which may be chargeable to the CORPORATION in connection with the pursuit of Acquired Association Claims, the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN or AMERICAN LIFE, where appropriate, promptly upon determining the necessarily to engage such attorneys or accountants or otherwise to incur such expenses, shall obtain and submit to the CORPORATION the following information, in a form satisfactory to the CORPORATION, supported by the supplementary documentation as in the opinion of the CORPORATION is necessary to enable the CORPORATION to give an informed consent to the ACQUIRING ASSOCIATION's, the ACQUIRER's, STATESMAN's or AMERICAN LIFE's engaging such attorneys or

accountants or otherwise incurring such expenses, which information shall include, but shall not be limited to, the following:

(A) The parties to the dispute and the relationships among them;

(B) The nature of the dispute and the basic facts concerning the dispute; and

(C) A description of the specific actions taken by the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN and AMERICAN LIFE in pursuit of such Claim prior to determining the need to engage attorneys or accountants or otherwise to incur expenses in pursuit of such Claim.

(2) In requesting the CORPORATION's written consent, pursuant to § 12(b) of this Agreement, to prosecute any Related Claim or Acquired Association Claim by court action, the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN or AMERICAN LIFE, were appropriate, promptly upon determining the necessity for such court action, shall obtain and submit to the CORPORATION an opinion prepared by the attorney handling such Claim in a form satisfactory to the CORPORATION and its counsel, supported by such supplementary documentation as in the opinion of counsel to the CORPORATION is necessary to enable the CORPORATION to give an informed consent to the prosecution of such Claim by court action, which opinion shall include, but shall not be limited to the following:

(A) The parties to the dispute and the relationships among them;

(B) The nature of the dispute and the basic facts concerning the dispute;

(C) A discussion of the causes of action raised by the dispute and the defenses to such causes of action, including citations to relevant statutes and

significant case law, and the attorney's evaluation of the merits of such causes of action and defenses; and

(D) The attorney's estimate of the time involved in prosecuting the Claim by court action, and the foreseeable costs and expenses, including attorneys' fees, which will be incurred in prosecuting the Claim by court action.

(3) In requesting the CORPORATION's written consent, pursuant to § 12(b)(5) of this Agreement, to enter into a binding commitment with respect to the satisfaction, settlement, or compromise of any Claim, liability or challenge referred to in § 12(b)(5)(C) and (D) of this Agreement, the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN or AMERICAN LIFE, where appropriate, promptly upon determining that the satisfaction, settlement, or compromise is appropriate, shall obtain and submit in the CORPORATION an opinion prepared by the attorney handling any such Claim, liability, or challenge, in a form satisfactory in the CORPORATION and its counsel, supported by such supplementary documentation as in the opinion of counsel to the CORPORATION is necessary to enable the CORPORATION to give an informed consent to such satisfaction, settlement, or compromise of such Claim, liability, or challenge, which opinion and supporting documentation shall include, but shall not be limited to, the following:

(A) The information required by subparagraphs (2)(A)-(D) of this § 11(f);

(B) Information concerning the status of litigation regarding the Claim, liabiiity, or challenge if litigation has been instituted, and, at the request of the CORPORATION, copies of all pleadings or other documents which have been filed in connection with such litigation; and

(C) The precise terms of the satisfaction, settlement, or compromise and the attorney's basis for

recommending the proposed satisfaction, settlement, or compromise of such Claim, liability or challenge.

(g) *Reports on Net Tax Benefits.* Unless waived by the CORPORATION, in each year the ACQUIRING ASSOCIATION shall submit a report to the CORPORATION, prepared by the ACQUIRING ASSOCIATION independent auditors and in a form and at a level of detail satisfactory to the CORPORATION, showing the total Tax Benefit Items available to the ACQUIRING ASSOCIATION, the total Tax Benefit Items, if any, utilized in such year, and the calculation of the Net Tax Benefits, if any, for such year. Such report shall be due on the date Net Tax Benefits, if any, are required to be credited to the Special Reserve Account or paid to the CORPORATION pursuant to § 3(c)(11) of this Agreement.

(h) *Other Reports.* The ACQUIRING ASSOCIATION shall provide upon demand by the CORPORATION such other reports concerning the status and condition of any asset or liabilities of the ACQUIRING ASSOCIATION as the CORPORATION reasonably may require.

Section 12. *Covenants of STATESMAN, AMERICAN LIFE, the ACQUIRER and the ACQUIRING ASSOCIATION.* The ACQUIRING ASSOCIATION covenants as follows:

(a) *Administration of Assets and Liabilities.* The failure of STATESMAN, AMERICAN LIFE, the ACQUIRER or the ACQUIRING ASSOCIATION to comply with any of the covenants in this § 12(a) with respect to any asset or liability acquired or assumed from the ACQUIRED ASSOCIATIONS, or with respect to any Related Claim or Acquired Association Claim, shall result in the disallowance of Debits to the Special Reserve Account that are related to such failure to comply or the adjustment of a contribution

or payment by the CORPORATION that is related to such failure to comply.

(1) *Management Standard.* The ACQUIRING ASSOCIATION shall administer and deal with all assets, liabilities and Claims to which it will succeed from the ACQUIRED ASSOCIATIONS, employing the standard or prudent business practice used by the ACQUIRING ASSOCIATION in administering assets, liabilities and Claims of the ACQUIRING ASSOCIATION not obtained from the ACQUIRED ASSOCIATIONS. Furthermore, the ACQUIRING ASSOCIATION shall use its best efforts in accordance with the management standard described in this subparagraph, to maximize losses and maximize gains and recoveries in the best interests of STATESMAN, AMERICAN LIFE, the ACQUIRER, the ACQUIRING ASSOCIATION and the CORPORATION.

(2) *Pursuit of Claims.*

(A) The ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN and AMERICAN LIFE shall exercise their best efforts, in accordance with §§ 8 and 12(a)(1), to pursue and file actions on all potentially recoverable Acquired Association Claims and Related Claims which accrue to the ACQUIRING ASSOCIATION as successor in interest to the ACQUIRED ASSOCIATIONS or arise otherwise, including, but not limited to, claims under the appropriate fidelity bond(s) or insurance policy or policies of the ACQUIRING ASSOCIATION or the ACQUIRED ASSOCIATIONS, whether discovered before or after the Effective Date.

(B) The ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN or AMERICAN LIFE, where appropriate, shall notify the CORPORATION before pursuing any Related Claim or Acquired Association Claim which could result in a Debit or

Credit to the Special Reserve Account. The ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN and AMERICAN LIFE, where appropriate, agree institute any legal action with respect to a Related Claim or Acquired Association Claim requested by the CORPORATION in connection with this Agreement. If the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN or AMERICAN LIFE objects to any such request, it shall provide its reasons in writing to the CORPORATION. If, after receipt of such statement, the CORPORATION nevertheless determines that a reasonable basis exists for instituting such legal action, then the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN and AMERICAN LIFE shall institute such action. The ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN and AMERICAN LIFE, where appropriate, will be indemnified by the CORPORATION for all losses resulting from, and reasonable costs and expenses of pursuing, the action excepting only losses arising from and to the extent attributable to the ACQUIRING ASSOCIATION's, the ACQUIRER's, STATESMAN's or AMERICAN LIFE's negligence or lack of the diligence in pursuing or prosecuting the action.

(b) *Conduct of Litigation.* With respect to all facilities, Claim, and challenges that could result in or effect a Debit or Credit to the Special Reserve Account ("Matter"), the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN or AMERICAN LIFE, as appropriate, shall:

(1) Keep the CORPORATION fully informed of the status of such Matters by timely filing current reports pursuant § 11 of this Agreement;

(2) Observe the right of the CORPORATION to monitor and direct the defense or prosecution of such

Matters, including the right to direct the ACQUIRING ASSOCIATION to file a petition to remove an action to the appropriate court or to repeal any determination of any court; *provided* that the CORPORATION shall bear the cost of removal or appeal and of monitoring and directing such defense or prosecution;

(3) Authorize the CORPORATION, upon the CORPORATION's election and at the CORPORATION's expense and with its own attorneys, to defend or to prosecute in the name of the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN, AMERICAN LIFE or the CORPORATION, as the case may be, any such Matter, and cooperate fully with the CORPORATION in such defense or prosecution, including, not limited to, furnishing to the CORPORATION all applicable books, records, and other information in the possession of the ACQUIRING ASSOCIATION, the ACQUIRER or any of their Affiliates, service corporations, or subsidiaries;

(4) At the request of the CORPORATION, assign to the CORPORATION, and subrogate the CORPORATION to, any right, title, or interest of the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN and AMERICAN LIFE in any such Claim, liability, challenge, any related defense (including counterclaim and settle), and any proceeds, and, in the event of such assignment, cooperate fully with the CORPORATION in the defense or prosecution of any such Claim, liability, or challenge, including, but not limited to, furnishing to the CORPORATION all books, records, and other information that are in the possession of the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN, AMERICAN LIFE or any of other Affiliates, subsidiaries, service corporations, agents or counsel; *provided*, that if a Claim had a

value on the books and records of any ACQUIRED ASSOCIATION immediately prior to the Effective Date, the ACQUIRING ASSOCIATION shall Debit such value, and adjusted or determined in accordance with the accounting principles required by this Agreement, to the Special Reserve Account; and

(5) By submission of a written request on a form pre-approved by the CORPORATION, obtain the CORPORATION's written consent before:

(A) engaging attorneys or accountants to pursue a Related Claim or Acquired Association Claim, the cost to those services may be chargeable to the CORPORATION pursuant to § 7 or § 8 of this Agreement, or otherwise incurring expenses in connection with a Related Claim or Acquired Association Claim may be chargeable to the CORPORATION pursuant to § 7 or § 8 of this Agreement;

(B) prosecuting any Related Claim or Acquired Association Claim by court action;

(C) entering into any binding commitment with respect to the satisfaction, settlement, or compromise of any Related Claim, Acquired Association Claim or challenge to the Acquisition or any Merger described in § 7(c); or

(D) entering into any binding commitment with respect to the satisfaction, settlement, or compromise of any Claim for which the CORPORATION is obligated to indemnify the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN or AMERICAN LIFE, other than a Related Claim, Acquired Association Claim, or a challenge to the Acquisition or any Merger, unless such satisfaction, settlement, or compromise would involve payment by the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN or AMERICAN LIFE of an aggregate amount not in excess of Twenty-Five Thousand Dollars

($25,000.00), or is entered into pursuant to an adjudication by a court of competent jurisdiction which, with the permission of the CORPORATION, the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN or AMERICAN LIFE has not appealed.

(c) *Covered Asset Restrictions.* The ACQUIRING ASSOCIATION shall not, without the CORPORATION's written consent (which shall be granted or denied within a reasonable period of time following receipt of a request for such consent) unless the CORPORATION waives such requirement in writing:

(1) lease any Covered Asset for a fixed term of more than one year;

(2) engage the services of any consultant, attorney, accountant, agent, or other professional in connection with the management or administration of any Covered Asset the cost of whose services may be debited to the Special Reserve Account pursuant to § 3(a); and

(3) extend, modify, or sell at a loss any loan or contract that is a Covered Asset, or extend or modify any loan or contract that could become a Covered Asset and result in a Debit to the Special Reserve Account; *provided* that, at the direction of the CORPORATION, the ACQUIRING ASSOCIATION shall sell any such loan or contract; *provided* that the CORPORATION's consent shall not be required if such Covered Asset is a Participation Interest and if the ACQUIRING ASSOCIATION used its best efforts to oppose any such action identified in subsections (1), (2), or (3) above.

(d) *Covered Asset Requirements.* The ACQUIRING ASSOCIATION shall, unless the CORPORATION waives any such requirement in writing:

(1) submit to the CORPORATION upon request an independent appraisal, acceptable to the CORPORATION, of any Covered Asset;

(2) promptly institute Foreclosure proceedings, as provided in § 14 of this Agreement, with respect to any loan that is a Covered Asset (other than a Participation Interest), unless the CORPORATION has given written approval for an alternative action;

(3) proceed promptly, within those procedures provided for in § 14 and in accordance with prudent business practice, with the Liquidation of any Real Estate Owned that is a Covered Asset (other than a Participation Interest);

(4) retain all written offers to purchase any Covered Asset pending inspection by the CORPORATION and not dispose of any such offer without the CORPORATION's prior written approval;

(5) use its best efforts, in accordance with the management standard described in § 12(a)(1) of this Agreement, to cause each parcel of Real Estate Owned, each Covered Asset or the property securing each Covered Asset, to be insured against loss or damage by fire (extended coverage), flood and any other such hazards that may normally be encountered with respect to such property and, to the extent applicable, in accordance with § 571.4 of the Insurance Regulations, or any successor regulation. Where appropriate, all insurance contracts shall contain the standard mortgage loss payable clause in favor of the ACQUIRING ASSOCIATION; and

(6) finance the disposition of Real Estate Owned for a Covered Asset in accordance with the ACQUIRING ASSOCIATION's normal underwriting standards, and without assistance from the CORPORATION except as may otherwise by provided pursuant to § [illegible](a) of this Agreement.

(7) with respect to any loan that is a Covered Asset, use its best efforts, in accordance with the management standard described in § 12(a)(1) of this Agreement, to undertake any and all actions directed by the CORPORATION to collect on such debt, including the institution and prosecution of legal action against the borrower; *provided* that

(A) in the event that the CORPORATION directs the ACQUIRING ASSOCIATION to institute and prosecute legal action against the borrower, any Claim of the ACQUIRING ASSOCIATION arising in connection with such action shall be seemed to be a Related Claim under this Agreement and the CORPORATION shall indemnify the ACQUIRING ASSOCIATION with respect to the pursuit of such Related Claim in accordance with § 7 of this Agreement;

(B) any sums recovered from a Related Claim under this § 12(d)(7) shall be credited to the Special Reserve Account pursuant to § 3(c)(10) of this Agreement; and

(C) any payment due from the CORPORATION to the ACQUIRING ASSOCIATION under this § 12(d)(7) shall be debited to the Special Reserve Account pursuant to § 3(a)(3) of this Agreement and deemed to be a contribution under this Agreement.

(e) *Disclosure of Agreement.* Except as otherwise required by law or generally accepted accounting principles, the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN or AMERICAN LIFE shall not, without the prior consent of the CORPORATION, disclose the terms of this Agreement, or the obligation of the CORPORATION to indemnify the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN and AMERICAN LIFE to any person, other than its employees or agents.

(f) *Tax Benefits.* The ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN and AMERICAN LIFE shall treat all Tax Benefit Items received from the CORPORATION on tax returns in such a manner as to maximize Net Tax Benefits that may result in a credit to the Special Reserve Account pursuant to § 3(c)(7), payment to the CORPORATION, or reduction in the loss incurred by the CORPORATION, *provided* that this covenant shall not be interested as requiring the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN or AMERICAN LIFE (i) to take any return position that (A) would be inconsistent with a published position of the Internal Revenue Service, unless the CORPORATION, after receipt for a request from the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN or AMERICAN LIFE, provides an opinion of independent counsel to the effect that such return position has a substantial likelihood of success, or (B) would increase a tax liability, or (ii) to make an election to file a separate return to satisfy this covenant. In the event that any such return position should be challenged by the Internal Revenue Service, the taxpayer shall (with the prior consent and at the expense of the CORPORATION, including reasonable attorneys' fees) take such steps as may reasonably be necessary to contest such challenge whether by way of contesting a proposed deficiency or by way of a refund claim), *provided* that the taxpayer may cease to defend such return position if it determines in good faith after prior consultation with the CORPORATION that further defense of such return position would adversely affect its federal income tax posture viewed as a whole. The CORPORATION shall cooperate with the ACQUIRING ASSOCIATION in all reasonable ways to assist the ACQUIRING ASSOCIATION in

establishing its entitlement to the Net Tax Benefits, including in connection with any possible audit by the Internal Revenue Service with respect thereto, and shall make such supporting documentation, not privileged or confidential, available to the ACQUIRING ASSOCIATION as the ACQUIRING ASSOCIATION may reasonably request. The covenants in this § 12(f) shall survive the Termination Date.

Section 13. *Sale and Repair of Covered Assets.*

(a) Unless otherwise permitted by the CORPORATION, compliance with the terms of this section shall be a condition precedent to the ACQUIRING ASSOCIATION's right to Debit to the Special Reserve Account, pursuant to § 3 of this Agreement, the amount of any loss on the Covered Asset, or to add to the Book Value of any Real Estate Owned that is a Covered Asset, any expenditure to repair, rehabilitate, or complete Real Estate Owned that is a Covered Asset, or portion thereof, that exceeds the applicable limitation of § 13(e) of this Agreement; *provided* that the terms of this section shall not apply to Participation Interests.

(b) As soon as practicable and not less than forty-five (45) days prior to the offering for sale of Real Estate Owned that is a Covered Asset as of the Effective Date, and otherwise within forty-five (45) days after the completion of a Foreclosure, including any applicable redemption period, of a loan that constitutes a Covered Asset and results in the acquisition of Real Estate Owned, the ACQUIRING ASSOCIATION shall provide to the CORPORATION a schedule of each such Covered Asset, setting forth a description of the Covered Asset, its Book Value, its estimated market value, the recommended listing sales price, the minimum sales price, the proposed terms of sale, and the estimated selling costs, and, unless waived by the

CORPORATION, an appraisal acceptable to the CORPORATION of each such Covered Asset.

(c) Within thirty (30) days after receipt of a schedule and an appraisal required by § 13(b), the CORPORATION shall:

(1) approve the proposed minimum sales price and the terms of sale for each Covered Asset, which may then be sold at less than such approved minimum sales price, upon the approved sales terms, without further notice to the CORPORATION; or

(2) disapprove the proposed minimum sales price of the terms of sale for any Covered Asset and establish a minimum sales price, which shall in no event be more than ninety (90%) percent of the value established by the appraisal, plus one hundred (100%) percent of the estimated selling costs, and the terms of sale. Thereafter, the ACQUIRING ASSOCIATION may sell such asset, at not less than the approved price and upon the approved sales terms, without further notice to the CORPORATION;

(3) purchase such Covered Asset at the lesser of Book Value, ninety (90%) percent of the value established by the appraisal, and the ACQUIRING ASSOCIATION's proposed minimum sales price (minus estimated selling costs). Purchases by the CORPORATION pursuant to this § 13 shall be treated as purchases by third parties for the purposes of §§ 3(a)(1) and 3(c)(1) of this Agreement. The amount payable by the CORPORATION in connection with such a purchase shall be debited to the Special Reserve Account as of the purchase date if the purchase occurs prior to the Termination Date, and shall be paid to the ACQUIRING ASSOCIATION by the CORPORATION in immediately available funds no later than ten (10) days following conveyance to the CORPORATION of the ACQUIRING ASSOCIATION's rights, title, and interest in such Covered

Asset if the purchase occurs after the Termination Date.

(d) The CORPORATION shall evaluate the marketing efforts made by the ACQUIRING ASSOCIATION, all written offers to purchase, current condition, and all other pertinent factors with respect to any Covered Asset on which a sales contract has not been accepted within ninety (90) days from the date on which the CORPORATION approved its sales price. The CORPORATION thereafter shall advise the ACQUIRING ASSOCIATION in writing concerning a revised sales price or additional marketing efforts.

(e) The ACQUIRING ASSOCIATION shall not:

(1) expend for the repair, rehabilitation, or completion of any Real Estate Owned that is a Covered Asset an amount in excess of Ten Thousand Dollars ($10,000.00) for a residential property, or in excess of Five Thousand Dollars ($5,000.00) per family unit plus Twenty Thousand Dollars ($20,000.00) for common areas, up to a maximum of Forty Thousand Dollars ($40,000.00) for a multi-family building, or in excess of Twenty Thousand Dollars ($20,000.00) for a commercial property; or

(2) expend any sum for the repair, rehabilitation, or completion of any Covered Asset that is not Real Estate Owned,

without the prior written consent of the CORPORATION, unless the CORPORATION expressly waives this requirement in writing or unless an emergency exists, such as a deficiency of the asset that violates a

provision of the sanitary, health, building, or notice code of the municipality, county, or state in which the asset is located or that affects its habitability, in which case the ACQUIRING ASSOCIATION may, without the CORPORATION's prior consent, expend such sums as may be necessary to correct or prevent such emergency.

(f) With respect to any Real Estate Owned that is a Covered Asset and for which the estimated costs of repair, rehabilitation, or completion exceed the limitation of § 13 (e), the ACQUIRING ASSOCIATION agrees to prepare a schedule showing Book Value, estimated market value as is, estimated cost to cure, estimated time for completion, and estimated market value as repaired or completed. Schedules for all such real estate shall be submitted within one hundred eighty (180) days from the Effective Date and thereafter as requested by the CORPORATION. Within thirty (30) days of receipt of such a schedule, the CORPORATION will advise the ACQUIRING ASSOCIATION concerning the action it shall take with respect to each asset that appears on the schedule.

(g) The CORPORATION shall have the right at any time to interview real estate agents, brokers, and others to whom listings have been given pursuant to this section.

(h) The CORPORATION, after discussion with the ACQUIRING ASSOCIATION, shall have the right to alter the procedures required by this § 13, including changing the dollar limits of 13(e), *provided* that any such change does not increase the ACQUIRING ASSOCIATION's duties, obligations, or expense of administration under this Agreement. The ACQUIRING ASSOCIATION and the CORPORATION agree

to cooperate to facilitate any possible simplification of procedures under this § 13.

Section 14. *Foreclosures.*

(a) Prior to the Foreclosure of any instrument securing a loan that is or may become a Covered Asset (other than a participation Interest), the ACQUIRING ASSOCIATION shall, upon the CORPORATION's request, inspect and evaluate or appraise the security property to determine its recoverable value, taking into consideration all circumstances affecting marketability of title, including the existence of any mechanic's or materialman's liens or other encumbrances on the security property.

(1) Except as provided in § 14(a)(2) below, if, the opinion of the ACQUIRING ASSOCIATION, the security property has recoverable value and the Book Value of the related covered Asset is less than One Hundred Thousand Dollars ($100,000.00), the ACQUIRING ASSOCIATION shall bid as follows:

(A) if there are no other bidders, the ACQUIRING ASSOCIATION may bid any amount which, in the ACQUIRING ASSOCIATION's opinion, will protect its interests and those of the CORPORATION and is in accordance with the management standard described in § 12(a)(1) of this Agreement. In no event, however, shall the amount of the bid be in excess of the principal amount to the indebtedness secured by such property immediately before foreclosure, plus:

(i) all costs and expenses of foreclosure;

(ii) any taxes and hazard insurance premiums due with respect to real property security, but unpaid as of the date of Foreclosure;

(iii) any accrued and unpaid interest on the principal amount of the indebtedness; and

(iv) any existing encumbrances such as having or sewage liens.

(B) If there are other bidders, the ACQUIRING ASSOCIATION may bid an amount not in excess of the lesser of appraised value and the amount provided in (A) above, *provided* that, in the ACQUIRING ASSOCIATION's opinion, such bid will protect its interests and those of the CORPORATION.

(2) If the ACQUIRING ASSOCIATION proposes to foreclose on a security property which has a recoverable value on the Book Value of the related Covered Asset is One Hundred Thousand Dollars ($100,000.00) or more, it shall so notify the CORPORATION in writing within thirty (30) days of commencing foreclosure and state the Book Value of the Covered Asset and all Interest due thereon, the ACQUIRING ASSOCIATION's estimate of the market value of the property securing such Covered Asset and the amount of the bid proposed for such sale ("first notice"). The ACQUIRING ASSOCIATION shall notify the CORPORATION of the foreclosure sale date when it is determined. Within thirty (30) days of receipt of the first notice, the CORPORATION shall approve the proposed bid; or advise the ACQUIRING ASSOCIATION of any other amount it should bid at such sale; or instruct the ACQUIRING ASSOCIATION to order an independent appraisal of such security property by an appraiser acceptable to the CORPORATION, in which case the CORPORATION shall notify the ACQUIRING ASSOCIATION, within ten (10) days after receipt of an appraisal acceptable to the

CORPORATION, of the amount to be bid at the foreclosure sale.

(b) The ACQUIRING ASSOCIATION shall advise the CORPORATION monthly of all completed Foreclosures subject to 12(a), citing the Book Value, appraised value, and the amount of the successful bid in each case. In addition, if the successful bid, whether by the ACQUIRING ASSOCIATION, or another party, results in a deficiency, the ACQUIRING ASSOCIATION shall advise the CORPORATION concerning the likelihood of securing a judgment against the defaulting mortgagor.

(c) A deed in lieu of Foreclosure or any equivalent instrument may not be obtained and no consideration shall be paid to the debtor under such deed without the written consent of the CORPORATION.

(d) In the case of any instrument securing a nonmortgage loan that is or may become a Covered Asset, the ACQUIRING ASSOCIATION shall follow up on such procedures and take such actions as the CORPORATION may request.

(e) Unless otherwise permitted by the CORPORATION, compliance with the provisions of this section by the ACQUIRING ASSOCIATION shall be a condition precedent to the ACQUIRING ASSOCIATION's right to Debit the Special Reserve Account with respect to any loss resulting from a Foreclosure.

Section 15. *CORPORATION's Right to Purchase Covered Assets.*

(a) At any time during the term of this Agreement and until the later of ninety (90) days after the Termination Date, or termination of the CORPORATION's obligation to provide assistance pursuant to § 19 of this Agreement, the CORPORATION shall

have the right to purchase without recourse against the ACQUIRING ASSOCIATION any or all Covered Assets that have not been liquidated prior to the ACQUIRING ASSOCIATION's receipt of the CORPORATION's notice that it shall exercise its right to purchase, at a purchase rice as stated in § 13(c)(3) of this agreement. Purchases by the CORPORATION pursuant to this § 15 shall be treated as purchases by third parties for the purposes of §§ 3(a)(1) and 3(c)(1) of this Agreement.

(b) The purchase price shall be debited to the Special Reserve Account as of the purchase date if the purchase occurs prior to the termination of this Agreement, or shall be paid to the ACQUIRING ASSOCIATION by the CORPORATION in immediately available funds within ten (10) days following conveyance to the CORPORATION of the ACQUIRING ASSOCIATION's right, title, and interest in such asset if the purchase occurs after the termination of this Agreement. The excess, if any, of the purchase state over the fair market value of such asset shall be deemed to be a contribution by the CORPORATION as provided in § 6 of this Agreement.

(c) In order to facilitate such sale to the CORPORATION, the ACQUIRING ASSOCIATION shall, at the CORPORATION's request:

(1) Provide the CORPORATION with such information as the CORPORATION deems necessary regarding the nature or condition of the Covered Asset and documenting the Book Value of such Covered Asset;

(2) Execute and deliver such instruments of sale, grant, conveyance, or transfer, and make endorse-

ments in such term and manner and at such time as the CORPORATION shall require; and

(3) Execute and deliver all such other instruments together with all insurance policies, title policies, and title certificates which the ACQUIRING ASSOCIATION possesses and are necessary or requisite, in the opinion of the CORPORATION, to complete such sale, grant, conveyance, or transfer.

(d) The Net Proceeds Received by the CORPORATION as a result of Liquidation of any Covered Asset purchased pursuant to 13 or 15 of this Agreement in excess of the purchase price and by the CORPORATION shall be retained by the CORPORATION to the extent it has made contributions under this Agreement that have not been repaid, and the remainder, if any, shall be paid to the ACQUIRING ASSOCIATION.

Section 16. *Sale of Assets of the ACQUIRING ASSOCIATION.* In the event of a Sale (as defined below), within seven (7) years following the Effective Date, by the ACQUIRING ASSOCIATION of any of its assets, or any of the capital stock of any subsidiary or Affiliate of the ACQUIRING ASSOCIATION formed to conduct any of the operations, or hold any of the assets, of the ACQUIRING ASSOCIATION, the ACQUIRING ASSOCIATION shall pay promptly to the CORPORATION a percentage to be agreed upon at such time, but in no event greater than fifty percent (50%), of the net proceeds of such Sale; *provided* that no such sale shall be consummated without the prior written approval of the CORPORATION; and *provided further* that in determining the amount of such net proceeds, an appropriate amount thereof (based upon the ratio of the assets being sold to the total assets of the ACQUIRING ASSOCIA-

TION) shall be allocated as a return of the investment of the ACQUIRER in the ACQUIRING ASSOCIATION. For the purposes of this § 16, the term "Sale" shall mean any and all sales consummated or agreed to during any 90 day period having an aggregate sales price of $20 million. If a Sale shall occur within five (5) years following the Effective Date without the approval of the CORPORATION, which approval may be granted or withhold at the sole discretion of the CORPORATION, notwithstanding the provisions of § 19 of this Agreement, this Agreement and all of the CORPORATION's obligations under it shall terminate immediately after the consummation of the sale. Notwithstanding anything herein to the contrary, the term "Sale" shall not include the transfer to an Affiliate of the ACQUIRER the stock or any or all of the assets and liabilities of Federated Financial, Combined Mortgage Corporation, Homestead Mortgage Corporation or Perpetual Financial Corporation.

Section 17. *Accounting Principles.* Except as otherwise provided, any computations made for purposes of this Agreement shall be governed by GAAP, except that where such principles conflict with the terms of the Agreement, applicable regulations in the Bank Board or the CORPORATION, or any resolution or action in the Bank Board approving or relating to the Acquisition, the Mergers or to this Agreement, then this Agreement, such regulations, or such resolution or action shall govern. In the case of any ambiguity in the interpretation or construction of any provision of this Agreement, such ambiguity shall be resolved in a manner consistent with such regulations and the Bank Board's resolution or action

relating to the Acquisition, the Mergers or of this Agreement. If there is a conflict between such regulations and the Bank Board's resolution or action relating to the Acquisition, the Mergers or to this Agreement, the Bank Board's Resolution or action shall govern. For purposes of this section, the accounting principles and governing regulations shall be those in effect on the Effective Date, as subsequently changed, amended, clarified or interpreted by the Bank Boad (as proposed, for example, at 52 *Fed. Reg.* 39112 *et seq.* (October 20, 1987)), its staff, or the Financial Accounting Standards Board ("FASB"), or any successor organization of the American Institute of Certified Public Accountants ("AICPA"). If there is a conflict between what is required by the FASB or the AICPA and what is required by the Bank Board, the interpretation of the Bank Board shall govern. The valuation of real estate assets shall be in accordance with the Bank Board's proposed regulations published on October 20, 1987 (52 *Fed. Reg.* 39070) or as those regulations are finally adopted by the Bank Board, or any successor regulations then in effect.

Section 18. *Notices.*

(a) Any notice or other communication required or submitted under this Agreement, unless otherwise specifically provided for, shall be deemed given if sent by first class mail, postage prepaid, to a party at its address set forth below or at such other address as the party shall furnish in writing:

If to the CORPORATION:

FEDERAL SAVINGS AND LOAN
INSURANCE CORPORATION

Attn: Director, Financial Assistance Division
1700 G Street, N.W.
Washington, D.C. 20552

If to the ACQUIRING ASSOCIATION:

Statesman Bank for Savings, FSB
Attn: Virgil Maxwell
1400 Des Moines Building
Des Moines, Iowa 50309

If to the ACQUIRER:

Statesman Savings Holding Corp.
Attn: David J. Noble
1400 Des Moines Building
Des Moines, Iowa 50309

If to STATESMAN:

The Statesman Group, Inc.
Attn: D.J. Noble, President
1400 Des Moines Building
Des Moines, Iowa 50309

If to AMERICAN LIFE:

American Life and Casualty Insurance Company
Attn: Jon P. Newsome, President
P.O. Box 2507
Fargo, North Dakota 58108

(b) Unless otherwise specifically provided for, if this Agreement requires that notice be given within a certain period of time, notice shall be deemed given as of the date of writing.

Section 19. *Termination of Agreement.*

(a) Except as otherwise specifically provided in § 16 elsewhere in this Agreement, this Agreement shall terminate five (5) years following the Effective Date or on such other date which the parties or their successors agree in writing, *provided* that if a receiver is appointed for the purpose of liquidating the ACQUIRING ASSOCIATION, or if the ACQUIRING ASSOCIATION ceases to be an association the accounts of which are insured by the CORPORATION, this Agreement and all of the CORPORATION's obligations under it shall terminate upon the effective date of such occurrence.

(b) Upon the Termination Date, the net Credit or Debit balance of the Special Reserve Account, if any, shall be paid or distributed in accordance with the provisions of § 6 of this agreement.

(c) Nothwithstanding termination of this Agreement as prescribed in § 19(a), the CORPORATION shall indemnify the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN or AMERICAN LIFE, as the case may be, for any loss arising from liabilities and Claims to the extent described in § 7 of this Agreement, including the reasonable costs and expenses of related litigation actually incurred and payable by the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN or AMERICAN LIFE and shall indemnify for the reasonable costs and expenses actually incurred and payable by the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN or AMERICAN LIFE, where appropriate, in pursuit of a Related Claim or Acquired Association Claim pursuant to §§ 7 or 8 of this Agreement, *provided*, that any such liability or Claim

is in litigation on the Termination Date; *provided further*, that the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN and AMERICAN LIFE continue to observe after the Termination Date all covenants, agreements of cooperation, reporting requirements, and agreements for the use of best efforts set forth in this Agreement; *provided further*, that any recovery by the ACQUIRING ASSOCIATION, and ACQUIRER, STATESMAN or AMERICAN LIFE, where appropriate, on any Related Claims or required Association Claims shall be paid over to the CORPORATION, subject to the limitations of §§ 7 and 8; and *provided further*, that the obligation of the CORPORATION stated in this § 19(c) shall terminate as stated in the proviso to § 19(a).

(d) Notwithstanding § 19(a) of this Agreement, the CORPORATION shall consider and act upon, in accordance with this Agreement, all reports, applications, requests, and other submissions that are subject to the CORPORATION's approval, consent, or other action, and that are actually received by the CORPORATION prior to or on the Termination Date, and the ACQUIRING ASSOCIATION, the ACQUIRER, STATESMAN and AMERICAN LIFE shall cooperate in the resolution of all such pending submissions as contemplated in this Agreement. The final accounting required by § 11(c) of this Agreement shall take account of all actions taken and determinations made by the CORPORATION pursuant to this § 19(d) and any related provisions of this Agreement.

Section 20. *Compliance with Law.* The ACQUIRING ASSOCIATION shall, and shall cause its subsidiaries, Affiliates, and service corporations to,

comply in all material respects with all applicable statutes, regulations, orders of, and restrictions imposed by the United States or any state, municipality, or other political subdivision, or by any agency of the foregoing public units, regarding the ownership of its properties and conduct of its business, including, without limitation, all applicable statutes, regulations, orders, and restrictions relating to equal employment opportunities, employment retirement income security, and environmental standards and controls; *provided*, however, that nothing contained in this § 20 shall require the ACQUIRING ASSOCIATION, or any of its subsidiaries, Affiliates, or service corporations, to comply with any law so long as the applicability thereof shall be contested in good faith.

Section 21. *Rights and Forbearances.* The rights, powers, and remedies given to the parties by this Agreement shall be in addition to all rights, powers, and remedies given by any applicable statute or rule of law. Any forbearance, failure, or delay by either party in exercising or partially exercising any such right, power, or remedy shall not preclude its further exercise.

Section 22. *Governing Law.* This Agreement and the parties' rights and obligation under it shall be governed by the law of the State of Iowa, to the extent that Federal law does not control. Nothing in this Agreement shall require any unlawful action or inaction by either party.

Section 23. *Entire Agreement, Severability.*

(a) This Agreement, together with any resolutions adopted by the Bank Board and documents delivered at closing which contain written interpretations or understandings of the parties, constitutes the entire

agreement between the parties and supersedes all prior agreements and understandings of the parties in connection with it, excepting only the Acquisition Agreement, the Merger Agreements and any resolutions or letters concerning the Acquisition, the Mergers or this Agreement issued by the Bank Board or the CORPORATION in connection with the approval of the Acquisition, the Mergers and this Agreement, *provided*, however, that in the event of any conflict, variance, or inconsistency between this Agreement and the Acquisition Agreement or the Merger Agreements, the provisions of this Agreement shall govern and be binding on all parties insofar as the rights, privileges, duties, obligations, and liabilities of the parties are concerned.

(b) If any provision of this Agreement is invalid or reinforceable, all of the remaining provisions of this Agreement shall nevertheless remain in full force and effect and shall be binding upon all the parties hereto.

Section 24. *Counterparts, Modifications, Headings.*

(a) This Agreement may be executed in any number of counterparts, each of which shall be an original but all of which shall constitute one and the same instrument, and any party may execute this Agreement by signing any such counterpart.

(b) No amendment or modification of this Agreement shall be binding unless executed in writing by the parties or their successors.

(c) Section headings are not to be considered part of this Agreement, are solely for convenience of reference, and shall not affect the meaning or interpretation of this Agreement or any of its provisions.

Section 25. *Successors and Assigns.* All the terms and provisions of this Agreement shall be binding upon and inure to the benefit of the parties and their respective transferees, successors, and assigns, but this Agreement may not be assigned to any party nor may any rights or obligations under it be transferred or delegated to or vested in any other party, through merger, consolidation, or otherwise, without the prior written consent of the CORPORATION.

Section 26. *Sole Benefit.* It is the intention of the parties that this Agreement, the assumption of obligations and statements of responsibilities under it, and all of its conditions and provisions are for the sole benefit of the parties hereto and for the benefit of no other person. Nothing expressed or referred to in this Agreement is intended or shall be construed to give any person other than the parties hereto any legal or equitable right, remedy, or claim under, or in respect to, this Agreement or any of its provisions.

Section 27. *Continuing Cooperation.* It is the purpose of this Agreement to provide a means by which the failure of the ACQUIRED ASSOCIATIONS may be prevented, the depositors and other creditors of the ACQUIRED ASSOCIATIONS may be protected against losses, the thrift and financing needs of the communities in which the ACQUIRED ASSOCIATIONS' offices are located may be served, the ACQUIRING ASSOCIATION and the CORPORATION may receive the benefits and assume the risks contracted for, and expense to the CORPORATION may be reduced. The parties therefore agree that they shall in good faith, and with their best efforts, cooperate to carry out the purposes of this Agreement as described in this section.

Section 28. *Brokerage Commission.* The CORPORATION agrees to pay one half of any brokerage commission or finders fee that the ACQUIRING ASSOCIATION, whether in its own right or as successor to any of the ACQUIRED ASSOCIATION's, the ACQUIRER, STATESMAN or AMERICAN LIFE, pays to an unaffiliated third party pursuant to a binding obligation incurred in connection with the requisition or any of the Mergers, *provided* that the CORPORATION's maximum liability pursuant to this paragraph shall be $170,000.00, and *provided further* that the CORPORATION shall not be obligated under any other provision of this Agreement (including without limitation § 7 hereof) to reimburse or indemnify any party to this Agreement in connection with any such brokerage or finders fee. Any amount owed by the CORPORATION pursuant to this paragraph shall be debited to the Special Reserve Account.

IN WITNESS WHEREOF, the parties have executed this Agreement by their duly authorized officers or agents.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

Date: June 11 1990
Attest:
By:
Its:

STATESMAN BANK FOR SAVINGS, FSB

Date: June 1 1990
Attest:
By:
Its: Vice-President

STATESMAN SAVINGS HOLDING CORP

Date: May 11, 1989
Attest:
By:
Its:

THE STATESMAN GROUP, INC.

Date: May 11, 1989
Attest:
By:
Its:

AMERICAN LIFE AND CASUALTY INSURANCE COMPANY

Date: 3/11/88
Attest:
By:
Its:

BEST AVAILABLE COPY

(19)

No. 95-865

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

WINSTAR CORPORATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOINT APPENDIX
VOLUME II OF II

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217
Counsel of Record for Petitioner

CHARLES J. COOPER
Shaw, Pittman, Potts, & Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000
Counsel of Record for Respondents Winstar Corporation and the Statesman Group, Inc., et al.

JERRY STOUCK
Spriggs & Hollingsworth
1350 I Street, N.W.
Ninth Floor
Washington, D.C. 20005
(202) 898-5800
Counsel of Record for Respondent Glendale Federal Bank, FSB

Petition for Writ of Certiorari Filed December 1, 1995
Certiorari Granted January 16, 1996

245 pp
3 f/d

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-865

UNITED STATES OF AMERICA, PETITIONER

v.

WINSTAR CORPORATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOINT APPENDIX

TABLE OF CONTENTS[1]

Page

WINSTAR

Court of Federal Claim Docket Entries, *Statesman Savings, et al.* v. *United States* (No. 90-CV-773) 1

Court of Federal Claims Docket Entries, *Winstar Corp., et al.* v. *United States* (No. 90-CV-8)..... 2

Court of Federal Claims Docket Entries, *Glendale Federal* v. *United States* (No. 90-CV-772)..... 3

Court of Appeals for the Federal Circuit Docket Entries, *Winstar Corp.* v. *United States* (No. 92-5164) 4

[1] The *en banc* and panel opinions of the Court of Appeals for the Federal Circuit and the opinions of the Court of Federal Claims are printed in the appendix to the petition for writ of certiorari and have not been reproduced here.

Complaint (Jan. 2, 1990) 6
FHLBB Memorandum from Kevin Aucello to Bob Brick (March 14, 1984) 37
Letter from McGladrey Hendrickson & Pullen to Harlan G. Halsne (May 10, 1984) 40
Financial Information Presentation (May 29, 1984) 43
FHLLB Memorandum from Nancy Shaen to Bob Brick (May 30, 1984) 46
FHLBB Memorandum from Robert Moore to Joseph Arendes (June 1, 1984) 49
FHLBB Memorandum from Harlan G. Halsne to J.J. Finn (June 28, 1984) 50
FHLBB Resolution No. 84-363 (July 6, 1984) .. 65
FHLBB Resolution No. 84-364 (July 6, 1984) .. 85
Assistance Agreement (July 12, 1984) 88
Combination Agreement and Plan of Merger (June 29, 1984 and July 12, 1984) 115
FHLBB Forbearance Letter (July 13, 1984) ... 123
Affidavit of E. Ted Yoch in Support of Plaintiff's Motion for Summary Judgment As To Liability (Mar. 27, 1990) 125

STATESMAN

Complaint (Aug. 15, 1990) 132
FHLBB Memorandum SP-37a, with attachment (March 7, 1986) 180
Excerpts from Instructions for Thrift Financial Reports (Jan. 1987) 183
FHLBB Acquisition Proposal (Jan. 8, 1988) ... 207
Excerpts from FHLBB Business Plan (Jan. 8, 1988) 228
Excerpts from Holding Company Application H-(e)1 (Feb. 12, 1988) 241
FHLBB S-Memorandum—Proposed FSLIC-Assisted Acquisition (Feb. 26, 1988) 248

FHLBB Memorandum from Darrel W. Dochow to John M. Buckley, Jr. (Mar. 11, 1988) 276
Excerpts from FHLBB Board Meeting Minutes, Closed Session (Mar. 11, 1988) 283
Merger Agreement And Plan Of Merger for Merger of First Federal Savings Bank into Statesman Bank (Mar. 11, 1988) 286
Merger Agreement And Plan Of Merger for Merger of Peoples Federal Savings and Loan Association into Statesman Bank (Mar. 11, 1988) 292
Merger Agreement And Plan Of Merger for Merger of The Perpetual Savings and Loan Association into Statesman Bank (Mar. 11, 1988) 298
Acquisition Agreement Between FSLIC As Receiver For First Federated Savings Bank and Statesman Bank (Mar. 11, 1988) 304
Assistance Agreement (March 11, 1988) 318
Regulatory Capital Maintenance Agreement (March 1988) 412
Bank Board Resolution No. 88-169 (March 11, 1988) 439
Letter from FHLBB to Statesman Bank Granting Forbearance (March 14, 1988) 475
Excerpts from *Oversight On The Condition Of The Financial Services Industry: Hearings Before The Senate Comm. On Banking, Housing, And Urban Affairs*, 100th Cong., 2d Sess. (May 19, 25, and 26, 1988) 481
Illustrative Thrift Financial Reports filed by Union Federal Savings Bank of Frankton and Coast Federal Bank (1988-1989) 491
Comptroller General Op. B-240860, with enclosure (Aug. 27, 1990) 507

Affidavit Of D. J. Noble In Support Of Plaintiff's Motion For Summary Judgment As To Liability (Sept. 5, 1990) 517

GLENDALE

Complaint (Aug. 15, 1990) 543
FHLBB Memorandum R 31b, Accounting For Goodwill In Accordance With GAAP Is Acceptable (Sept. 1, 1981)..... 571
Letter from Peat, Marwick, Mitchell & Co. to Glendale Board of Directors, with attachment (Nov. 19, 1981)..... 575
Excerpt from Agreement Of Merger Between Glendale Federal Savings And Loan Association and First Federal Savings And Loan (Nov. 12, 1981)..... 578
FHLBB Letter to Richard Fink (Nov. 16, 1981) 580
Letter from Glendale to Lawrence Hayes (Nov. 17, 1981)..... 583
FSLIC Memorandum, Financial Information Presentation (Nov. 18, 1981)..... 586
Supervisory Action Agreement (Nov. 19, 1981).. 587
Bank Board (Forbearance Letter) (Nov. 19, 1981) 602
FHLBB Resolution No. 81-710 (Nov. 19, 1981).. 605
FHLBB Resolution No. 81-712 (Nov. 19, 1981).. 611
Excerpts from Transcript Of Client-Furnished Tapes of FHLBB Meeting (Nov. 19, 1981) .. 613
Letter from Glendale to Milton Feinerman, with enclosures (Mar. 19, 1982)..... 618
OTS Thrift Bulletin 38-1 (Jan. 9, 1990)..... 625
Affidavit Of Raymond D. Edwards In Support Of Plaintiff's Motion For Summary Judgment As To Liability (Aug. 23, 1991) 628
Affidavit Of David T. Hansen In Support Of Plaintiff's Motion For Summary Judgment As To Liability (Sept. 3, 1991) 633

Affidavit Of Harold B. Shore In Support Of Plaintiff's Motion For Summary Judgment As To Liability (Sept. 4, 1991) 639
Glendale's Proposed Findings Of Uncontroverted Fact (Sept. 13, 1991) 643
Orders Allowing Certiorari 648

REGULATORY CAPITAL MAINTENANCE
AGREEMENT
AMONG
THE STATESMAN GROUP, INC.
Des Moines, Iowa,

AMERICAN LIFE AND CASUALTY
INSURANCE COMPANY
Fargo, North Dakota,

STATESMAN SAVINGS HOLDING CORP.
Des Moines, Iowa,

STATESMAN BANK FOR SAVINGS, FSB
Waterloo, Iowa

AND

THE FEDERAL SAVINGS AND LOAN
INSURANCE CORPORATION

DATED March ____, 1988

REGULATORY CAPITAL MAINTENANCE
AGREEMENT

AMONG

THE STATESMAN GROUP, INC.
Des Moines, Iowa,

AMERICAN LIFE AND CASULTY
INSURANCE COMPANY
Fargo, North Dakota,

STATESMAN SAVINGS HOLDING CORP.
Des Moines, Iowa,

STATESMAN BANK FOR SAVINGS, FSB
Waterloo, Iowa

AND

THE FEDERAL SAVINGS AND LOAN
INSURANCE CORPORATION

DATED March ____, 1988

TABLE OF CONTENTS

		Page
Recitals		[415]
Agreement		[418]
§ 1.	Regulatory Capital Maintenance by the ACQUIRER and the ACQUIRING ASSOCIATION	[418]
§ 2.	Calculation of Required Regulatory Capital	[419]
§ 3.	Waiver of Net Worth Assistance	[419]
§ 4.	Guarantees by STATESMAN and AMERICAN LIFE	[419]
§ 5.	Covenants of the ACQUIRER, the ACQUIRING ASSOCIATION, STATESMAN and AMERICAN LIFE	[420]

§ 6. Irrevocable Proxies ..... [427]
§ 7. CORPORATION's Voting and Disposition Rights ..... [428]
§ 8. Duration of Agreement and of Certain Provisions ..... [432]
§ 9. Specific Performance ..... [432]
§ 10. Notices ..... [433]
§ 11. Rights and Forbearances ..... [434]
§ 12. Governing Law ..... [434]
§ 13. Entire Agreement, Severability ..... [434]
§ 14. Counterparts, Modifications, Headings [435]
§ 15. Successors and Assigns ..... [435]

Signature Page ..... [436]

Exhibit A: First Irrevocable Proxy ..... [437]
Exhibit B: Second Irrevocable Proxy ..... [438]

REGULATORY CAPITAL MAINTENANCE AGREEMENT

THIS AGREEMENT, dated March ____, 1988, is entered into by among The Statesman Group, Inc., a Delaware corporation (STATESMAN"), American Life and Casualty Insurance Company, a Dakota corporation wholly owned by STATESMAN ("AMERICAN LIFE"), Statesman Savings Holding Corp., a savings and loan company incorporated under the laws of the State of Iowa ("ACQUIRER"), Statesman Bank for Savings, FSB, Des Moines, Iowa, federally-chartered stock savings bank ("ACQUIRING ASSOCIATION"), and the Federal Savings and Loan Insurance Corporation ("FSLIC"), in its capacity as a corporate instrumentality and agency of the United States ("CORPORATION").

RECITALS

A. AMERICAN LIFE owns all of the outstanding voting parties of the ACQUIRER and AMERICAN LIFE is wholly owned by STATESMAN. Therefore, STATESMAN and AMERICAN LIFE "control" the ACQUIRER, as that term is used in Part 574 of the Regulations for the Federal Savings and Loan Insurance Corporation ("Insurance Regulations"), 12 C.F.R. Part 574 (1987).

B. By Resolution No. 88-____ dated March ____, 1988, Federal Home Loan Bank Board ("Bank Board") appointed the receiver ("RECEIVER") for First Federated Savings Bank, Palm Beach, Florida, a stock savings bank chartered under laws of the State of Florida ("CLOSED ASSOCIATION"). By Resolution No. 88-____, dated March ____, 1988, the

Bank Board has authorized the ACQUIRING ASSOCIATION to purchase and assume essentially all of the assets and liabilities of the CLOSED ASSOCIATION from the Receiver pursuant to the Acquisition Agreement of even date herewith between the RECEIVER and the ACQUIRING ASSOCIATION ("Acquisition Agreement").

C. By Resolution No. 88-____, dated March ____, 1988, the Bank Board has authorized the supervisory conversion of First Federal Savings Bank, Waterloo, Iowa, a federally-chartered Federal savings bank ("First Federal"), and the merger of First Federal with and into the ACQUIRING ASSOCIATION ("First Federal Merger"), pursuant to the Merger Agreement and Plan of Merger of the date herewith between First Federal and the ACQUIRING ASSOCIATION ("First Federal Merger Agreement").

D. By Resolution No. 88-____, dated March ____, 1988, the Bank Board has authorized the supervisory conversion of The Perpetual Savings and Loan Association, Waterloo, Iowa, a mutual savings and loan association chartered under the laws of the State of Iowa ("Perpetual"), and the merger of Perpetual with and the ACQUIRING ASSOCIATION ("Perpetual Merger"), pursuant to the Merger Agreement and Plan of Merger of even date herewith between Perpetual and the ACQUIRING ASSOCIATION ("Perpetual Merger Agreement").

E. By Resolution No. 88-____, dated March ____, 1988, the Bank Board has authorized the supervisory conversion of Peoples Savings and Loan Association, Waterloo, Iowa, a Federally-chartered mutual savings and loan association ("Peoples"), and the merger of Peoples with and into the ACQUIRING ASSOCIATION ("Peoples Merger"), pursuant to the Merger Agreement and Plan of Merger of even date herewith

between Peoples and the ACQUIRING ASSOCIATION ("Peoples Merger Agreement").

F. First Federal Perpetual and Peoples may be sometimes referred to herein individually as a "MERGED ASSOCIATION" and collectively as the "MERGED ASSOCIATIONS". The First Federal Merger, the Perpetual Merger and the Peoples Merger may be sometimes referred to herein individually as a "Merger" and collectively as the "Mergers", and the First Federal Merger Agreement, the Perpetual Merger Agreement and the Peoples Merger Agreement sometimes referred to herein individually as a "Merger Agreement" and collectively as the "Merger Agreements".

G. By Resolution No. 88-____, dated March ____, 1988, and Bank Board has authorized the purchase of all of the ACQUIRING ASSOCIATION's stock by the ACQUIRER, and the ACQUIRER has agreed to purchase all of the shares of common stock to be usually issued by the ACQUIRING ASSOCIATION.

H. The ACQUIRING ASSOCIATION, pursuant to the Acquisition Agreement, will succeed to substantially all of the rights, litigations, duties and liabilities of the CLOSED ASSOCIATION, and will acquire substantially all of the assets and property of every kind and character belonging to the CLOSED ASSOCIATION (Requisition").

I. The ACQUIRING ASSOCIATION, pursuant to the Merger agreements, will succeed to all of the rights, obligations, duties and liabilities of the MERGED ASSOCIATIONS, and will require all of the assets and property of every kind and character belonging to the MERGED ASSOCIATIONS.

J. The CORPORATION has decided, pursuant to § 6(f)(1)-(4) of the National Housing Act, as amended ("NHA"), U.S.C. § 1729(f)(1)-(4) (1982), to provide

financial assistance and indemnification in connection with the Acquisition and the Mergers. Such financial assistance and indemnification is set forth in an Assistance Agreement of even date herewith among the ACQUIRER, the ACQUIRING ASSOCIATION and the CORPORATION.

K. A condition to the obligation of the CORPORATION to provide financial assistance and indemnification as set forth in the Assistance Agreement is that the ACQUIRER, STATESMAN, AMERICAN LIFE and the ACQUIRING ASSOCIATION enter into an agreement in the form of this Agreement, pursuant to which the CORPORATION will receive certain assurances and rights with respect to maintenance of the regulatory capital of the ACQUIRING ASSOCIATION.

L. In consideration of the mutual promises contained herein, the parties enter into the following Agreement.

AGREEMENT

§ 1. *Regulatory Capital Maintenance by the ACQUIRER and the ACQUIRING ASSOCIATION.* So long as the ACQUIRER directly or indirectly controls the ACQUIRING ASSOCIATION, as the term ("control" is defined in Part 574 of the Insurance Regulations, 12 C.F.R. Part 574 (1987), or any successor regulation, as now or thereafter in effect, the ACQUIRER and the ACQUIRING ASSOCIATION shall cause the "regulatory capital," as defined in § 561.13 of the Insurance Regulations, 12 C.F.R. § 561.13 (1987), or any successor regulation, as now or hereafter in effect, of the ACQUIRING ASSOCIATION ("ACQUIRING ASSOCIATION's

Regulatory ("Capital") to be maintained at the level ("Required Regulatory Capital") required by § 563.13(b) of the Insurance Regulations, C.F.R. § 563.13(b) (1987), or any successor regulation, as now thereafter in effect ("Regulatory Capital Regulation"), without regard to any net worth assistance for which the ACQUIRING ASSOCIATION may qualify pursuant to § 406(f)(5) of the NHA, 12 U.S.C. § 1729(f)(5) (1982), as in effect now or as reenacted or amended to the future, and the regulations of the FSLIC issued pursuant to 406(f)(5), or any successor regulation, as now or hereafter in effect. The form of any capital infusion required by this § 1 must be acceptable to the Principal Supervisory Agent of the Bank Board, Des Moines, Iowa, or his designee ("P.S.A.").

§ 2. *Calculation of Required Regulatory Capital.* For purposes of this Agreement, any determination of the ACQUIRING ASSOCIATION's Required Regulatory Capital shall be as calculated in the FSLIC or the P.S.A., and shall include in the ACQUIRING ASSOCIATION's Regulatory Capital amounts permitted by the FSLIC to the Assistance Agreement and in the forbearances issued in connection with the transactions discussed herein.

§ 3. *Waiver of Net Worth Assistance.* The ACQUIRER and the ACQUIRING ASSOCIATION hereby waive any right to any net worth assistance for which the ACQUIRING ASSOCIATION may qualify pursuant to § 406(f)(5) of the NHA, 12 U.S.C. § 1729(f)(5) (1982), and the regulations of the FSLIC issued thereunder, or any successor institute or regulations, as now or hereafter in effect.

§ 4. *Guarantees by STATESMAN and AMERICAN LIFE.* So as the ACQUIRER shall be obligated pursuant to § 1, STATESMAN and AMERICAN

LIFE jointly and severally, in proportion to their initial contributions of capital to the ACQUIRER as selected in the percentages set forth opposite their signatures , hereby guarantee the performance of the ACQUIRER and the ACQUIRING ASSOCIATION under § 1 by hereby agreeing to infuse additional capital into the ACQUIRING ASSOCIATION in the same amounts as their initial contributions of capital to the ACQUIRER. Provided that STATESMAN and AMERICAN LIFE shall not be obligated under said guarantees to infuse additional capital worth more than $4,000.000 in the aggregate.

§ 5. *Covenants of the ACQUIRER, the ACQUIRING ASSOCIATION, STATESMAN and AMERICAN LIFE.* Unless the CORPORATION, in its sole discretion, consents or otherwise agrees, in either case or writing:

(a) The ACQUIRER will not, directly or indirectly, through one or more transactions, issue any voting priorities, stock options, warrants, or other instruments or mitigations convertible into voting securities of the ACQUIRER or which, upon the occurrence of one or more events, may acquire any voting rights with respect to the ACQUIRER, to any person or other than STATESMAN or AMERICAN LIFE, so long as AMERICAN LIFE is wholly owned by STATESMAN. If the CORPORATION consents or otherwise agrees to any such issuance, the ACQUIRER must disclose the provisions of this Agreement to such person or entity prior to such transaction and such person or entity must agree to be bound by the provisions of this Agreement other than § 4 (but including § 6(a) which would require such person or entity to deliver to the Secretary to the Bank Board ("Secretary") an revocable proxy in the form attached hereto as Exhibit A duly executed

by such person or entity, along with the certificate(s) presenting all of the shares of the voting stock of the ACQUIRER held by such person or entity, properly endorsed for transfer or accompanied by fully endorsed stock powers), as if person or entity were a signatory hereto;

(b) Neither STATESMAN nor AMERICAN LIFE shall assign, give, transfer, exchange, pledge or otherwise dispose of or encumber any shares of voting stock of the ACQUIRER, or any interest therein. If the CORPORATION consents or otherwise agrees to any such disposition or encumbrance, the proposed transferee or assignee of such shares or an interest therein must agree to be bound by the provisions of this Agreement, other than or the proposed pledgee or other holder of any right to insure such shares or an interest therein must agree to be bound to the provisions of this Agreement, other than § 4, in the event such person exercises such pledge or right, as if such transferee, assignee, pledgee, or holder were a signatory hereto. The provisions to which such transferee, assignee, pledgee or holder shall be bound shall include § 6(a), which would require the transferee, assignee, pledgee or holder to deliver to the Secretary an irrevocable proxy in the form attached hereto as Exhibit A duly executed by such transferee, assignee, pledgee or order, along with the certificate(s) or instrument(s) representing all of the shares of the voting stock of the ACQUIRER, or interests therein, held by such transferee, assignee, pledgee or order, properly endorsed for transfer or accompanied by fully endorsed stock powers or other instruments for assignment;

(c) STATESMAN and, so long as AMERICAN LIFE is only owned by STATESMAN, AMERICAN

LIFE shall, directly or indirectly, own not less than two-thirds of the outstanding voting power of the ACQUIRER, *provided* that in determining the outstanding voting power of the ACQUIRER, any stock options, warrants, or other instruments or obligations convertible into securities of the ACQUIRER or which, upon the occurrence of one or more events, may acquire any voting rights with respect to the ACQUIRER, shall be included in such determination;

(d) The ACQUIRER's charter and bylaws shall provide for the removal of directors at any time, with or without base:

(e) The ACQUIRER's charter and bylaws shall not require, nor shall the ACQUIRER be organized in any jurisdiction the law of which requires, the affirmative vote of more than two-thirds of the voting power of the ACQUIRER to approve any merger, consolidation, disposition of all or substantially all of the assets of the ACQUIRER or any similar extraordinary transaction involving the ACQUIRER ("Extraordinary Acquirer Transaction") or to amend its charter or bylaws;

(f) The ACQUIRING ASSOCIATION will not, directly or indirectly, through one or more transactions, issue any voting securities, stock options, warrants, or other instruments or obligations convertible into voting securities of the ACQUIRING ASSOCIATION or which, upon the occurrence of one or more events, may acquire any voting rights with respect to the ACQUIRING ASSOCIATION, to any person or entity other than the ACQUIRER. If the CORPORATION consents or otherwise agrees to any such issuance, the ACQUIRING ASSOCIATION must disclose the provisions this Agreement to such person or entity prior to such transaction and such person or entity must agree to be bound by

provisions of this Agreement other than § 4 (but including, the period from seven years after the date thereof (the date hereof being hereinafter referred to as the "Effective Date") to ten years after the Effective Date, § 6(b), which would require such person or entity to deliver to the Secretary to the Bank Board ("Secretary") an irrevocable proxy in the form attached hereto as Exhibit B duly executed by such person or entity, along with the certificate(s) representing all of the shares of the voting stock of the ACQUIRING ASSOCIATION held by such person or entity, properly endorsed for transfer or accompanied by full endorsed stock powers), as if such person or entity were a signatory hereto;

(g) The ACQUIRER shall not sell, assign, give, transfer, exchange, pledge or otherwise dispose of or encumber shares of voting stock of the ACQUIRING ASSOCIATION, or any interest therein. If the CORPORATION consents or otherwise agrees to any such disposition or encumbrance, the proposed transferee or assignee of such shares or an interest therein must agree to be bound by the provisions of this Agreement, other than § 4, or the proposed pledgee or other holder of any right to acquire such shares or an interest therein must agree to be bound by to the provisions of this Agreement, other than § 4, in the event the person exercises such pledge or right, as if such transferee, assignee, pledgee, or holder were a signatory hereto. The provisions to which such transferee, assignee, pledgee or other shall be bound shall include § 6(b), which would require transferee, assignee, pledgee or holder to deliver to the Secretary an irrevocable proxy in the form attached hereto as Exhibit B duly executed by such transferee, assignee, pledgee or holders, along with the certificate(s) or instrument(s) representing all of the shares

of the voting stock of the ACQUIRING ASSOCIATION, or interests therein, held by such transferee, assignee, pledgee or holder, properly endorsed for transfer or accompanied by fully endorsed stock powers or other instruments for assignment;

(h) The Acquirer shall not cause or permit, nor shall the ACQUIRING ASSOCIATION cause, any merger, consolidation, disposition of all or substantially all of the assets of the ACQUIRING ASSOCIATION or any similar extraordinary transaction involving the ACQUIRING ASSOCIATION ("Extraordinary Acquiring Association Transaction");

(i) The ACQUIRING ASSOCIATION's charter and laws shall not require, nor shall the ACQUIRING ASSOCIATION be organized in any jurisdiction the law of which requires, the affirmative vote of more than two-thirds of the voting power of the ACQUIRING ASSOCIATION to approve any Extraordinary Acquiring Association Transaction, or to amend its charter or bylaws;

(j) The ACQUIRING ASSOCIATION's bylaws shall provide that the shareholders have the right to remove any or all the directors of the ACQUIRING ASSOCIATION, with or without cause;

(k) The ACQUIRING ASSOCIATION will not, and the ACQUIRER will not cause the ACQUIRING ASSOCIATION to, declare or pay a dividend in any fiscal year (1) that would cause the ACQUIRING ASSOCIATION's Regulatory Capital to fall below the required Regulatory Capital level established in § 1, or (2) that exceeds 50 percent of the ACQUIRING ASSOCIATION's net income for the fiscal year as reflected on the ACQUIRING ASSOCIATION's quarterly financial reports to the Bank Board, without the prior written consent of the P.S.A. and the concurrence of the Executive Director of the

Office of Regulatory Policy, Oversight and Supervision of the Bank Board (the "ORPOS Director"), *provided* that any dividends permitted under these limitations may be deferred and paid in a subsequent year, but in no event may the ACQUIRING ASSOCIATION pay dividends that would reduce its regulatory capital below the Required Regulatory Capital level;

(l) Each instrument or certificate evidencing shares of voting securities of the ACQUIRER owned by STATESMAN or AMERICAN LIFE, and such securities transferred by STATESMAN or AMERICAN LIFE or any donee, transferee or assignee thereof, shall be stamped or imprinted with a legend in the following form:

> "The securities represented by this certificate (a) may not be sold, transferred or otherwise disposed of except in compliance with the restrictions contained in a Regulatory Capital Maintenance Agreement dated as of March ____, 1988 among the Company and the parties named therein (a copy of which Agreement is available for inspection at the principal offices of Company), (b) are subject to an irrevocable proxy as set forth in such Agreement, and (c) are subject to certain other terms, provisions, options and rights, including a prohibition on pledges and other restrictions on transfer included in such Agreement and the possibility of forfeiture."

(m) Each instrument or certificate evidencing shares of voting securities of the ACQUIRING ASSOCIATION owned by the ACQUIRER, and such securities transferred by the ACQUIRER or any donee, transferee or assignee thereof, shall be

stamped or imprinted with a legend in the following form:

> "The securities represented by this certificate (a) may not be sold, transferred or otherwise disposed of except in compliance with the restrictions contained in a Regulatory Capital Maintenance Agreement dated as of March ——, 1988 among the Association and the parties named therein (a copy of which Agreement is available for inspection at the principal offices of the Association), (b) are subject to an irrevocable proxy as set forth in such Agreement, and (c) are subject to certain other terms, provisions, options and rights, including a prohibition on pledges and other restrictions on transfer included in such Agreement and the possibility of forfeiture."

In the event of a violation of any of the covenants set forth in § 5, the CORPORATION shall have the right to proceed as set forth in § 7(a) or (b) as if the ACQUIRING ASSOCIATION's Regulatory Capital had, as of the date of such violation, fallen below the level specified in § 7. The ACQUIRER shall have the right to cure any violation of any covenant as is specified with regard to any regulatory capital deficiency; and

(n) The ACQUIRING ASSOCIATION shall notify the CORPORATION whenever the ACQUIRING ASSOCIATION's Regulatory Capital, as reported on the ACQUIRING ASSOCIATION's Monthly Report for any month filed with the Bank Board, is at or below three percent (3%). The president as well as the senior financial officer of each of STATESMAN and the ACQUIRING ASSOCIATION shall undertake to take affirmative action to remain informed so that this provision is effected. Notwithstanding the

provisions of §§ 5(a), (b) and (k) above, STATESMAN and AMERICAN LIFE shall not be precluded from issuing voting securities, stock options, warrants or other instruments obligations convertible into voting securities of STATESMAN or AMERICAN LIFE, or from selling, assigning, giving, transferring, arranging, pledging or otherwise disposing of or encumbering any shares of voting stock of STATESMAN or AMERICAN LIFE.

§ 6. *Irrevocable Proxies*

(a) *Irrevocable Proxy and Delivery of Stock Certificate by AMERICAN LIFE.* Concurrently with the execution of this Agreement, AMERICAN LIFE shall execute an irrevocable proxy in the form attached hereto as Exhibit A ("First Irrevocable Proxy", and deliver the First Irrevocable Proxy to the Secretary, along with the certificate representing all of the parties of the voting stock of the ACQUIRER, properly endorsed for transfer or accompanied by fully endorsed stock powers. Such delivery is for the purpose of effecting the terms of this Agreement, in particular § 7(a) hereof. The Secretary shall hold the First Irrevocable Proxy and such certificate on behalf of the CORPORATION. If additional voting securities are issued to STATESMAN or AMERICAN LIFE after the execution of this Agreement, STATESMAN or AMERICAN LIFE promptly shall deliver to the Secretary the certificate(s) representing such shares, properly endorsed for transfer or accompanied by fully endorsed stock powers. Until such time as the CORPORATION invokes its rights under § 7(a), subject to the other provisions of this Agreement, all rights related to the voting securities of the ACQUIRER owned by STATESMAN or AMERICAN LIFE shall be retained by STATESMAN or AMERICAN LIFE.

(b) *Irrevocable Proxy and Delivery of Stock Certificate by the ACQUIRER.* Seven years after the Effective Date, the ACQUIRER shall execute an irrevocable proxy in the form attached hereto as Exhibit B ("Second Irrevocable Proxy"), and deliver the Second Irrevocable Proxy to the Secretary, along with the certificate representing all of the shares of the voting stock of the ACQUIRING ASSOCIATION, properly endorsed for transfer or accompanied by fully endorsed stock powers. Such delivery is for the purpose of effecting the terms of this Agreement, in particular § 7(b) hereof. In exchange for such delivery, the First Irrevocable Proxy shall be returned to AMERICAN LIFE. The Secretary shall hold the Second Irrevocable Proxy and such certificate on behalf of the CORPORATION. If additional voting securities are issued to the ACQUIRER after the execution of the Second Irrevocable Proxy, the ACQUIRER promptly shall deliver to the Secretary the certificate(s) representing the shares, properly endorsed for transfer or accompanied by fully endorsed stock powers. Until such time as the CORPORATION invokes its rights under § 7(b), subject to the other provisions in this Agreement, all rights related to the voting securities of the ACQUIRING ASSOCIATION owned by the ACQUIRER shall be retained by the ACQUIRER.

§ 7. *CORPORATION's Voting and Disposition Rights.*

(a) If the ACQUIRING ASSOCIATION's Regulatory Capital shall, at the end of any month from the Effective Date seven years from the Effective Date, fall below two percent (2%) of "total liabilities," as defined in § 563.13(b)(1)(i) of the Regulatory Capital Regulation and as calculated by the FSLIC or the P.S.A. for such month, and such deficiency shall

not have been eliminated by the date of the filing of the ACQUIRING ASSOCIATION's Monthly Report for such month with the Bank Board, the CORPORATION, acting through the P.S.A., the Executive Director of the FSLIC ("FSLIC Director") or the ORPOS Director, shall have the right to send a notice ("Notice") to the ACQUIRER, STATESMAN and AMERICAN LIFE that the CORPORATION is invoking the provisions of this § 7(a). The ACQUIRER shall have 10 days from the date of receipt of the Notice in which to cure such deficiency. If such deficiency is not eliminated within such 10-day period, the CORPORATION, acting through the P.S.A., the FSLIC Director, or the ORPOS Director, in any case with the concurrence of the Office of General Counsel of the Bank Board, shall have the absolute right, in its sole discretion, to:

(1) vote pursuant to the First Irrevocable Proxy all voting securities of the ACQUIRER, including, without limitation, the exercise of such voting power:

(A) in favor of, and causing the taking of such steps as may be necessary to consummate, an extraordinary Acquirer Transaction, an Extraordinary Acquiring Association Transaction or the sale of any or all of the ACQUIRING ASSOCIATION'S voting securities, even if no value is received in respect of the voting securities or net assets of the ACQUIRING ASSOCIATION or the ACQUIRER; and/or

(B) to remove the board of directors of the ACQUIRER and/or the ACQUIRING ASSOCIATION; and/or

(C) to cause the ACQUIRER or the ACQUIRING ASSOCIATION to issue to the CORPORATION or another party or parties designated by

the CORPORATION, in its sole discretion, for nominal or no consideration, voting securities representing two-thirds of the voting power of the ACQUIRER or the ACQUIRING ASSOCIATION after such issuance; and/or

(2) dispose of any or all of the voting securities of the ACQUIRER, even if no value is received in respect of such securities.

In the event of any such transaction or disposition, owners of voting securities of the ACQUIRER or the ACQUIRING ASSOCIATION, as the case may be, shall be entitled to any consideration paid in respect of such securities less each such person's proportionate share of the costs associated with the transaction or disposition including, without limitation, any financial assistance provided by the CORPORATION in connection with such transaction or disposition.

(b) If the ACQUIRING ASSOCIATION's Regulatory Capital shall, at the end of any month after seven years from the Effective Date, fall below two percent (2%) of "total liabilities," as defined in § 563.13(b)(1)(i) of the Regulatory Capital Regulation and as calculated by the FSLIC or the P.S.A. for such month, and such deficiency shall not have been terminated by the date of the filing of the ACQUIRING ASSOCIATION's Monthly Report for such month with the Bank Board, the CORPORATION, acting through the P.S.A., the Executive Director of the FSLIC ("FSLIC Director") or the ORPOS Director, shall have the right to send a notice ("Notice") to the ACQUIRER, STATESMAN and AMERICAN LIFE that the CORPORATION is invoking the provisions of this § 7(b). The ACQUIRER shall have 10 days from the date of receipt of the Notice in which to cure such deficiency. If such deficiency is not eliminated within such 10-day period,

the CORPORATION, acting through the P.S.A., the FSLIC Director, or the ORPOS Director, in any case with the concurrence of the Office of General Counsel of the Bank Board, shall have the absolute right, in its sole discretion, to:

(1) vote pursuant to the Second Irrevocable Proxy all voting securities of the ACQUIRING ASSOCIATION, including, without limitation, the exercise of such voting power:

(A) in favor of, and causing the taking of such steps as may be necessary to consummate, an extraordinary Acquiring Association Transaction or the sale of any or all of the ACQUIRING ASSOCIATION'S voting securities, even to value is received in respect of the voting securities or net assets of the ACQUIRING ASSOCIATION; and/or

(B) to remove the board of directors of the ACQUIRING ASSOCIATION; and/or

(C) to cause the ACQUIRING ASSOCIATION to issue to the CORPORATION or another party or parties designated by the CORPORATION, in its sole discretion, for nominal or no consideration, voting securities representing two-thirds of the voting power of the ACQUIRING ASSOCIATION after such issuance; and/or

(2) dispose of any or all of the voting securities of the ACQUIRING ASSOCIATION, even if no value is received in respect of such securities.

In the event of any such transaction or disposition, owners of voting securities of the ACQUIRING ASSOCIATION shall be entitled to any consideration paid in respect of such securities less each such person's proportionate share of the costs associated with the transaction or disposition including, without limitation, any financial assistance provided by the CORPORATION in connection with such transaction or disposition.

§ 8. *Duration of Agreement and of Certain Provisions.*

(a) The obligations set forth in §§ 1-4 and 9-15 shall be perpetual.

(b) The obligations set forth in §§ 5(a)-(e), [illegible], 6(a) and 7(a) shall terminate seven years from the Effective Date.

(c) The obligations set forth in §§ 5(f)-(k), [illegible], 6(b) and 7(b) shall terminate ten years from the Effective Date.

§ 9. *Specific Performance.* The ACQUIRER, the ACQUIRING ASSOCIATION, STATESMAN and AMERICAN LIFE acknowledge and agree that the rights reserved to the CORPORATION hereunder are of a special, unique, unusual and extraordinary character, which gives them a peculiar value, the loss of which cannot be adequately or reasonably compensated for in damages in an action at law, and a breach by any of the ACQUIRER, the ACQUIRING ASSOCIATION, STATESMAN and AMERICAN LIFE of any of the provisions hereof will cause the CORPORATION irreparable injury and damage. In such event, the CORPORATION shall be immediately entitled, as a matter of right, to require of the defaulting party specific performance in all of the acts and undertakings required hereunder of such party including the obtaining of all requisite authorizations to execute or perform this Agreement and to obtain injunctive and other equitable relief in any court of competent jurisdiction including, without limitation, the United States District Court (for the District of Columbia) to prevent the violation or threatened violation of any of the provisions hereof. Neither this provision nor any exercise by the CORPORATION of rights to equitable relief or specific performance herein granted shall constitute a waiver of any other rights which it may have to damages or otherwise.

§ 10. *Notices.*

(a) Any notices or other communication required or permitted under this Agreement, unless otherwise specifically provided for, shall be deemed given when delivered if delivered personally or by U.S. Express Mail or commercial overnight courier service, or three business days after posting if sent by first class mail, postage prepaid, to a party at its address set forth below or at such other address as the party shall furnish in writing:

If to the ACQUIRER:

Statesman Savings Holding Corp.
Attn: David J. Noble, President
1400 Des Moines Building
Des Moines, Iowa 50309

If to the ACQUIRING ASSOCIATION:

Statesman Bank for Savings, FSB
Attn: Virgil Maxwell, President
1400 Des Moines Building
Des Moines, Iowa 50309

If to STATESMAN:

The Statesman Group, Inc.
Attn: D.J. Noble, President
1400 Des Moines Building
Des Moines, Iowa 50309

If to AMERICAN LIFE:

American Life and Casualty Insurance Company
Attn: Jon P. Newsome, President
P.O. Box 2507
Fargo, North Dakota 58108

If to the CORPORATION:

Federal Savings and Loan Insurance Corporation
Attn: Director, Financial Assistance Division
801 17th Street, N.W.
Washington, D.C. 20552

If to the P.S.A.:

Principal Supervisory Agent
Federal Home Loan Bank of Des Moines
907 Walnut Street
Des Moines, Iowa 50309

(b) Unless otherwise specifically provided for, this Agreement requires that notice be given within a certain period of time, notice shall be deemed given as of the date of testing.

§ 11. *Rights and Forbearances.* The rights, powers, and remedies given to the parties by this Agreement shall be in addition to all rights, powers, and remedies given by any applicable statute or rule of law. Any forbearance, failure, or delay by a party in exercising or partially exercising any such right, power, or remedy shall not preclude its further exercise.

§ 12. *Governing Law.* To the extent that Federal law does not control, this Agreement and the parties' rights and obligations under it shall be governed by the law of the State of Iowa. Nothing in this Agreement shall require any unlawful action or inaction by either party.

§ 13. *Entire Agreement, Severability,*

(a) This Agreement, together with any internation or understanding agreed to in writing by the parties, constitutes the entire agreement among the parties and supersedes any prior agreements and understandings of the parties in connection with the subject matter hereof.

(b) If any provision of this Agreement is invalid or unenforceable, all of the remaining provisions of this Agreement shall nevertheless remain in full force and effect and shall be binding upon the CORPORATION, the ACQUIRER, the ACQUIRING ASSOCIATION, STATESMAN and AMERICAN LIFE.

§ 14. *Counterparts, Modifications, Headings.*

(a) This Agreement may be executed in any number of counterparts, each of which shall be an original, but all of which shall constitute one and the same instrument, and any party execute this Agreement by signing any such counterpart.

(b) No amendment or modification of this Agreement shall be binding unless executed in writing by all the parties or their successors.

(c) Section headings are not to be considered part of this Agreement, are solely for convenience of reference, shall not affect the meaning or interpretation of this Agreement or any of its provisions.

§ 15. *Successors and Assigns.* All the terms and provisions of this Agreement shall be binding upon and inure to the benefit of the parties and their respective transferees, successors and assigns.

IN WITNESS WHEREOF, the parties have executed this Agreement or caused it to be executed on their behalf by their duly authorized officers or agents.

ATTEST: FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

_____ By: /s/_____

_____ Its: _____

ATTEST: THE STATESMAN GROUP, INC. (60%)

_____ By: /s/_____

_____ Its: _____

ATTEST: AMERICAN LIFE AND CASUALTY INSURANCE COMPANY (40%)

_____ By: /s/_____

_____ Its: _____

ATTEST: STATESMAN SAVINGS HOLDING CORP.

_____ By: /s/_____

_____ Its: _____

ATTEST: STATESMAN BANK FOR SAVINGS, FSB

_____ By: /s/_____

_____ Its: _____

EXHIBIT A

FIRST IRREVOCABLE PROXY

The undersigned agrees to and does hereby grant to the Federal Savings and Loan Insurance Corporation, a corporate instrumentality of the United States ("FSLIC"), an irrevocable proxy pursuant to the provisions of _____ to vote, or to execute and deliver written consents or otherwise with respect to, all voting securities ("Stock") of Statesman Savings Holding Corp. ("Company") now owned or hereafter acquired by the undersigned as fully, and to the same extent and with the same effect, as the undersigned might or could do under any applicable laws or regulations governing the rights and powers of stockholders of a _____ corporation, in accordance with, as provided in, and for the time period specified in, a certain Regulatory Capital Maintenance Agreement, dated March __, 1988, among the undersigned, the Company, The Statesman Group, Inc., Statesman Bank for Savings, FSB ("Association") and the FSLIC. The undersigned hereby affirms that this proxy is given as a condition of said Regulatory Capital Maintenance Agreement and in connection with the acquisition of the Association by the Company and as such is coupled with an interest and is, therefore, irrevocable. This proxy may be exercised by the Principal Supervisory Agent of the Federal Home Loan Bank Board ("Bank Board"), Des Moines, Iowa, the Executive Director of the FSLIC, or the Executive Director of the Office of Regulatory Policy, Oversight and Supervision of the Bank Board, with the concurrence of the Office of the General Counsel of the Bank Board, at any meeting of the stockholders of the Company or in any action of such stockholders without a meeting. This Proxy shall terminate ten years from the effective date of the Regulatory Capital Maintenance Agreement in accordance with the terms thereof.

Dated this __ day of March, 1988.

AMERICAN LIFE AND CASUALTY INSURANCE COMPANY

By:_____

Its:_____

EXHIBIT B

SECOND IRREVOCABLE PROXY

The undersigned agrees to and does hereby grant to the Federal Savings and Loan Insurance Corporation, a corporate instrumentality of the United States ("FSLIC"), an irrevocable proxy pursuant to the provisions of _____ to vote, or to execute and deliver written consents or otherwise with respect to, all voting securities ("Stock") of Statesman Bank for Savings, FSB ("Association") now owned or hereafter acquired by the undersigned as fully, and to the same extent and with the same effect, as the undersigned might or could do under any applicable laws or regulations governing the rights and powers of stockholders of a Federal stock association, in accordance with, as provided in, and for the time period specified in, a certain Regulatory Capital Maintenance Agreement, dated March __, 1988, among the undersigned, American Life and Casualty Insurance Company, The Statesman Group, Inc., the Association and the FSLIC. The undersigned hereby affirms that this proxy is given as a condition of said Regulatory Capital Maintenance Agreement and in connection with the acquisition of the Association by the undersigned and as such is coupled with an interest and is, therefore, irrevocable. This proxy may be exercised by the Principal Supervisory Agent of the Federal Home Loan Bank Board ("Bank Board"), Des Moines, Iowa, the Executive Director of the FSLIC, or the Executive Director of the Office of Regulatory Policy, Oversight and Supervision of the Bank Board, with the concurrence of the Office of the General Counsel of the Bank Board, at any meeting of the stockholders of the Association or in any action of such stockholders without a meeting. This proxy shall terminate ten years from the effective date of the Regulatory Capital Maintenance Agreement in accordance with the terms thereof.

Dated this __ day of _____, 1988.

STATESMAN SAVINGS
HOLDING CORP.

By:_____

Its:_____

FEDERAL HOME LOAN BANK BOARD

Approval of
Organization of Statesman Bank for Savings, FSB, Waterloo, Iowa, and
Acquisition of Assets and Liabilities of First Federated Savings Bank, West Palm Beach, Florida, and Supervisory Conversions and Mergers of First Federal Savings Bank, Waterloo, Iowa, Peoples Federal Savings and Loan Association, Waterloo, Iowa, and the Perpetual Savings and Loan Association, Waterloo, Iowa

No. 88-169P
Date: March 11, 1988

WHEREAS, First Federated Savings Bank, West Palm Beach, Florida ("Closed Association"), is a state-chartered stock savings bank, the accounts of which are insured by the Federal Savings and Loan Insurance Corporation ("FSLIC"); and

WHEREAS, The FSLIC has been appointed by the Federal Home Loan Bank Board ("Bank Board") as sole receiver ("Receiver") for the Association effective as described in Bank Board Resolution No. 88-167P, dated March 11, 1988; and

WHEREAS, The FSLIC as Receiver is authorized by § 406(c)(3)(B) of the National Housing Act, as amended ("NHA"), 12 U.S.C. § 1729(c)(3)(B) (1982), upon its appointment taking effect, to liquidate the Closed Association in an orderly manner or to make such other disposition of the matter as the FSLIC deems to be in the best interests of the Closed Association, its savers, and the FSLIC; and

WHEREAS, First Federal Savings Bank, Waterloo, Iowa ("First Federal"), is a federally-chartered mutual savings bank, the accounts of which are insured by the FSLIC; and

WHEREAS, Peoples Federal Savings and Loan Association, Waterloo, Iowa ("Peoples"), is a federally-chartered mutual savings and loan association, the accounts of which are insured by the FSLIC; and

WHEREAS, The Perpetual Savings and Loan Association, Waterloo, Iowa ("Perpetual"), is a mutual savings and loan association chartered under the laws of the State of Iowa, the accounts of which are insured by the FSLIC; and

WHEREAS, The FSLIC has been appointed by the Bank Board as sole conservator ("Conservator") for Perpetual effective as described in Bank Board Resolution No. 88-168, dated March 11, 1988; and

WHEREAS, First Federal, Peoples and Perpetual may be sometimes referred to herein individually as an "Acquired Association" and collectively as the "Acquired Associations", and the Closed Association and the Acquired Associations may be sometimes referred to herein individually as an "Association" and collectively as the "Associations"; and

WHEREAS, The Statesman Group, Inc., a Delaware corporation ("Statesman"), in connection with its bid to acquire the Associations, has proposed the incorporation and organization by the FSLIC of Statesman Bank for Savings, FSB, Waterloo, Iowa, ("New Federal"), as a new federal stock savings bank, pursuant to § 406(a) of the NHA, 12 U.S.C. § 1729(a) (1982), and, together with

its wholly owned subsidiary American Life and Casualty Insurance Company, a North Dakota corporation ("American Life") (collectively, the "Applicants"), has submitted an H-(e)1 Application, including Amendment Number 1 thereto ("Application") to the FSLIC, pursuant to § 408(e) of the NHA, 12 U.S.C. § 1720a(e) (1982), and § 574.7 of the Regulations for Savings and Loan Holding Companies ("Holding Company Regulations"), 12 C.F.R. § 574.7 (1987), for prior written approval (1) for Statesman Savings Holding Corp., a savings and loan holding company incorporated under the laws of the State of Iowa and owned by the Applicants ("Acquirer") to acquire the common stock of New Federal, and (2) for the Applicants to acquire control of the Acquirer; and

WHEREAS, The FSLIC has proposed that the Receiver transfer substantially all of the assets and liabilities of the closed Association to New Federal; and

WHEREAS, The Bank Board has considered a proposed plan of organization ("Plan of Organization") and exhibits thereto for New Federal (copies of which are in the Minute Exhibit File); and

WHEREAS, The Bank Board has considered a proposed subordinated debenture ("Subordinated Debenture") (a copy of which is in the Minute Exhibit File) to be issued by New Federal to the FSLIC; and

WHEREAS, The Bank Board has considered a proposed acquisition agreement ("Acquisition Agreement") between New Federal and the FSLIC as Receiver for the Closed Association, pursuant to which New Federal will purchase substantially all of the assets and assume substantially all of the liabilities of the Closed

Association, but would not assume any obligations to stockholders or holders of subordinated debt of the Closed Association ("Acquisition") (a copy of which Agreement is in the Minute Exhibit File); and

WHEREAS, The Bank Board has considered a proposed receiver's agreement ("Receiver's Agreement") between the FSLIC in its corporate capacity ("Corporation") and the FSLIC as Receiver for the Closed Association, pursuant to which the Corporation will purchase from the Receiver certain assets of the Closed Association not purchased by New Federal and assume certain liabilities of the Closed Association not assumed by New Federal (a copy of which agreement is in the Minute Exhibit File); and

WHEREAS, The FSLIC has proposed that the Receiver transfer substantially all of the assets and liabilities of the Closed Association to New Federal; and

WHEREAS, The boards of directors of New Federal and the Acquired Associations have adopted or will adopt by at least a two-thirds vote of their respective boards, and such associations (including Perpetual by the Conservator on its behalf), have executed, plans of merger evidenced by Merger Agreements and Plans of Merger ("Merger Agreements") (copies of which Agreements, as executed, are in the Minute Exhibit File), pursuant to which the Acquired Associations will merge with and into New Federal ("Mergers"); and

WHEREAS, The Applicants, on behalf of New Federal, have applied to the FSLIC, pursuant to § 563.22 of the Rules and Regulations for the FSLIC ("Insurance Regulations"), 12 C.F.R. § 563.22 (1987), for approval of an increase in the accounts of New Federal of an insurable type by reason of the Acquisition and the Mergers; and

WHEREAS, The Acquisition and the Mergers will be conditioned upon the execution of, and the Bank Board has considered, a proposed assistance agreement ("Assistance Agreement") among New Federal, the Acquirer, the Applicants and the Corporation, pursuant to which the Corporation will provide certain financial assistance to New Federal and indemnification to the Applicants, the Acquirer and New Federal to facilitate the Acquisition and the Mergers, and a related Promissory Note ("Note") (copies of which agreement and note are in the Minute Exhibit file); and

WHEREAS, The Bank Board has considered memoranda from Supervisory Agents of the Bank Board, Atlanta Georgia, and Des Moines, Iowa, dated March 2 and February 26, 1988, respectively, with which memoranda the Office of Regulatory Policy, Oversight and Supervision ("ORPOS") has concurred, and memoranda from the Executive Director of the FSLIC, dated March 10, 1988, and from the General Counsel, dated March 11, 1988, together with accompanying attachments and exhibits (copies of which are in the Minute Exhibit File);

Chartering of New Federal Stock Association

NOW, THEREFORE, IT IS RESOLVED, That, upon the appointment of the Receiver by the Bank Board becoming effective, as provided in Resolution No. 88-167P, dated March 11, 1988, the FSLIC, under the authority of § 406(a) of the NHA, 12 U.S.C. § 1729(a) (1982) is authorized to organize a new federal stock savings bank to be known as Statesman Bank for Savings, FSB; and

RESOLVED FURTHER, That, pursuant to a proposal by the FSLIC consistent with the Application, in order to facilitate the liquidation of the Closed Association, the FSLIC's providing for the organization and incorporation of New Federal in accordance with the proposed Plan of Organization and the exhibits thereto is approved; and

Completion of Organization

RESOLVED FURTHER, That, pursuant to § 552.2-3 of the Rules and Regulations for the Federal Savings and Loan System ("Federal Regulations"), 12 C.F.R. § 552.2-3 (1987), the organization of New Federal shall be deemed complete when a duly authorized officer of New Federal has certified to completion of the steps required by paragraphs (A) through (O) of the proposed Plan of Organization; and

RESOLVED FURTHER, That if the conditions set forth in the immediately preceding resolving paragraph are not satisfied, the Federal Stock Charter of New Federal shall be cancelled and withdrawn and its corporate existence shall then be terminated; and

Authority of the FSLIC to Execute Documents for Organization of Statesman Bank for Savings, FSB

RESOLVED FURTHER, That the Executive Director or a Deputy Executive Director of the FSLIC, or a designee of any of them ("Director"), is hereby authorized to execute or approve on behalf of the FSLIC all documents necessary for the organization of New Federal, including those approved by the Bank Board, and such additional, modified, or substituted documents as the Director determines to be necessary or desirable

to organize or implement the organization of New Federal, *provided* that the form of any such document is approved by the Office of the General Counsel ("OGC"); and

Authority of Secretary or Assistant Secretaries to Attest Organizational Documents

RESOLVED FURTHER, That the Secretary or an Assistant Secretary, including any Assistant Secretary appointed for the purpose of implementing the transactions approved in this and ancillary resolutions, may attest or take other appropriate actions on behalf of the Bank Board, the FSLIC or the Receiver with respect to the organization of New Federal; and

Issuance of Forms

RESOLVED FURTHER, That all forms issued after completion of the organization of New Federal evidencing funds on deposit with New Federal shall be in the form approved by the appropriate Supervisory Agent of the Bank Board, Des Moines, Iowa ("Supervisory Agent"), and shall indicate that New Federal is a stock savings bank; and

Issuance of Charter and Bylaws

RESOLVED FURTHER, That a Charter in the form of the proposed Federal Stock Charter is hereby approved and shall be issued to New Federal, and the Secretary or an Assistant Secretary to the Bank Board may attest and date said Charter upon the direction of the OGC, and such Charter shall be deemed issued at the time of such dating and attesting by the Secretary or Assistant Secretary; *provided* that such Charter shall be deemed

to be amended to permit New Federal to invest in Statesman preferred stock; and

RESOLVED FURTHER, That the Bylaws of New Federal in the form proposed are hereby approved; and

Membership in the Federal Home Loan Bank

RESOLVED FURTHER, That, upon receipt of its Charter, New Federal shall be a member of the Federal Home Loan Bank of Des Moines ("Bank"), and the Secretary or an Assistant Secretary to the Bank Board shall issue a certificate of bank membership to New Federal; and

Insurance of Accounts

RESOLVED FURTHER, That insurance of accounts of New Federal is hereby approved, and the Secretary or an Assistant Secretary to the Bank Board is authorized to issue a certificate of insurance to New Federal and the FSLIC admission fee is waived, and the initial premium, if any, shall be paid upon determination by the Director, *provided* that the proposed Application for Insurance of Accounts and Agreement for Operating Policies are executed by New Federal in accordance with the Plan of Organization and returned to the FSLIC; and

Further Actions

RESOLVED FURTHER, That the Director, the General Counsel, and the Secretary or an Assistant Secretary to the Bank Board are hereby authorized and directed to take all other actions necessary or appropriate to further document or implement the incorporation

and organization of New Federal, its membership in the Bank, insurance of its accounts or any related matter contemplated in this Resolution; and

General Findings Concerning the Acquisition of Substantially All of the Assets and Liabilities of the Closed Association by New Federal

RESOLVED FURTHER, That the Bank Board, as operating head of the FSLIC, hereby finds and determines that: (1) the transfer of assets and liabilities of the Association provided for in the Acquisition Agreement and the Receiver's Agreement is the most desirable alternative, consistent with Bank Board and FSLIC policy, to the liquidation of the Association and the payment of insurance on its accounts, which would result in the loss of the savings and loan services provided by the Closed Association to the community it serves and the recovery by accountholders having uninsured funds and creditors of only ratable distributions from the liquidation of the assets of the Closed Association; (2) the execution and implementation of the Acquisition Agreement and the Receiver's Agreement are in the public interest and in the best interests of the Closed Association, its savers and creditors, and the Corporation; and (3) delay in the execution and implementation of the Acquisition Agreement and the Receiver's Agreement following the Receiver's taking possession of the Closed Association would prevent such a transfer of assets and liabilities and result in the liquidation of the Closed Association and the payment of insurance on its accounts; and

Approval of Purchase and Assumption Transaction

RESOLVED FURTHER, That the Bank Board hereby finds and determines that the transfer of substantially

all of the Closed Association's assets and liabilities to New Federal in accordance with § 406 of the NHA, 12 U.S.C. § 1729(c)(3)(13) (1982), and pursuant to the Acquisition Agreement should be effected without delay, is in the public interest and is in the best interests of the Closed Association, its savers and creditors, and the Corporation; and

RESOLVED FURTHER, That the Bank Board, pursuant to § 552.13 of the Federal Regulations, 12 C.F.R. § 552.13 (1987), hereby approves the transfer of substantially all of the Closed Association's assets and the assumption of substantially all of the Closed Association's liabilities to and by New Federal, pursuant to the Acquisition Agreement, and, as operating head of the FSLIC, further approves the resulting increase in New Federal's accounts of an insurable type, pursuant to § 563.22 of the Insurance Regulations, 12 C.F.R. § 563.22 (1987), *provided* that:

(1) The board of directors of New Federal shall authorize the execution of, and New Federal shall enter into, an agreement to purchase substantially all of the assets and assume substantially all of the liabilities of the Closed Association, in the form or substantially in the form of the proposed Acquisition Agreement, *provided* that the final form of such Acquisition Agreement has been approved by the OGC, and New Federal shall execute such other documents as may be necessary to effect such transfer of assets and liabilities of the Association to New Federal promptly upon the Receiver taking possession of the Association; and

(2) Not later than ninety (90) days following the effective date of the Acquisition Agreement ("Effective Date"), the Acquirer and New Federal shall submit to the Principal Supervisory Agent of the Bank Board, Des Moines, Iowa ("PSA") or the Supervisory Agent an independent certified public accountant's opinion that the Acquirer and New Federal have accounted for the acquisition in accordance with generally accepted accounting principles ("GAAP"); and

RESOLVED FURTHER, That the Bank Board, pursuant to § 552.15 of the Federal Regulations, 12 C.F.R. § 552.15 (1987), deems it necessary, in order to avert the imminent failure of the Closed Association, to waive or deem inapplicable certain provisions of § 552.13 of the Federal Regulations, 12 C.F.R. § 552.13 (1987), and hereby waives and deems inapplicable paragraph (f), (i), (j), (l) and (m) of § 552.13; and

RESOLVED FURTHER, That the Bank Board deems the Acquisition Agreement and the Application to be in substantial compliance with paragraphs (g) and (h) of § 552.13 of the Federal Regulations, 12 C.F.R. § 552.13 (1987); and

Authority for the Receiver to Transfer Assets and Liabilities of the Closed Association

RESOLVED FURTHER, That the proposed Acquisition Agreement and the proposed Receiver's Agreement are hereby approved and the FSLIC as Receiver for the Closed Association is hereby authorized to sell and transfer to New Federal substantially all of the assets and liabilities of the Closed Association

and to enter into an Acquisition Agreement and a Receiver's Agreement with respect to the Closed Association in the form or substantially in the form of each such proposed agreement, *provided* that the final form of each such agreement has been approved by the OGC; and

RESOLVED FURTHER, That stockholders and holders of subordinated debt of the Closed Association shall be entitled to receive payment only in accordance with the terms of the Acquisition Agreement; and

RESOLVED FURTHER, That the Special Representative(s) of the FSLIC as Receiver for the Closed Association, designated in or pursuant to Bank Board Resolution No. 88-167 dated March 11, 1988, is hereby authorized to execute, on behalf of the FSLIC as Receiver, an Acquisition Agreement and a Receiver's Agreement with respect to the Closed Association in the form or substantially in the form of each such proposed agreement, to execute all other documents necessary or desirable to implement the provisions of any such Acquisition Agreement and Receiver's Agreement or to complete the acquisition of substantially all of the assets and liabilities of the Closed Association by New Federal, and otherwise to implement the intent and purposes of said agreements and this Resolution, *provided* that the final form of each such agreement and document has been approved by the OGC; and

Authorization of the Corporation to Execute Agreements and Make Payments

RESOLVED FURTHER, That the Director is hereby authorized to execute on behalf of the Corporation a Receiver's Agreement in the form or substantially in

the form of such proposed agreement, and to execute all other documents and perform all provisions of the Receiver's Agreement and otherwise to implement the intent and purpose of said agreement, *provided* that the final forms of such agreement and other documents have been approved by the OGC; and

RESOLVED FURTHER, That the Corporation is authorized to make advances and pay expenses to or on behalf of the Receiver in accordance with the Receiver's Agreement; and

RESOLVED FURTHER, That the FSLIC in its corporate capacity is authorized to pay all necessary or appropriate expenses incurred by, or on behalf of, the Operations and Liquidations Division, Office of the FSLIC, in preparation for the appointment of the FSLIC as receiver for the Closed Association, *provided* that no such expenditures to be made by the FSLIC in its corporate capacity shall extend to services rendered or goods received after the date and time the FSLIC as Receiver takes possession of the Closed Association; and

Supervisory Merger Conversions of the Acquired Associations

RESOLVED FURTHER, That the Bank Board, as operating head of the FSLIC, finds that:

(1) Each Acquired Association's liabilities exceed its assets, as calculated under generally accepted accounting principles on a going concern basis;

(2) Following the supervisory conversion and merger of each Acquired Association with and into New Federal

and the Acquisition, the resulting association will be a viable entity; and

RESOLVED FURTHER, That the conversion of each Acquired Association from the mutual to the stock form of organization as a part of a supervisory transaction may be and hereby is approved under § 5 or the Home Owners' Loan Act of 1933, as amended ("HOLA"), 12 U.S.C. § 1464 (1982), and, pursuant to the findings of this Resolution, good cause exists for a waiver of the requirements of Part 563(b) of the Rules and Regulations of the FSLIC ("Insurance Regulations"), 12 C.F.R. Part 563b (1987); and

RESOLVED FURTHER, That, pursuant to the exception provisions in §§ 563b.1(a) and 563.20 of the Insurance Regulations, 12 C.F.R. §§ 563.1(a) and 563b.20 (1987), the terms of this Resolution, and not the requirements set forth in part 563b of the Insurance Regulations, 12 C.F.R. § 563b (1987), shall govern the conversion of each Acquired Association; the Acquired Associations shall not be converted in accordance with Subpart C of Part 563b; and § 563b.10 of the Insurance Regulations shall not apply, except that, pursuant to § 563b.10(c)(2), the protection of § 563b.(i)(3) of the Insurance Regulations, 12 C.F.R. § 563b3.(i)(3) (1987), shall apply to New Federal and its affiliates, but only for one year following thee Effective Date; and

Emergency Thrift Acquisition Findings

RESOLVED FURTHER, That the Bank Board, as operating head of the FSLIC, hereby determines with respect to the Acquisition and the Mergers that:

1. Severe financial conditions exist which threaten the

stability of a significant number of institutions, the accounts of which are insured by the FSLIC ("insured institutions"), and of insured institutions possessing significant financial resources;

2. Each of the Associations is a failing institution that is eligible for assistance pursuant to § 406(f) of the NHA, 12 U.S.C. § 1729(f) (1982);

3. The procedures used by agents of the FSLIC to solicit practicable offers from prospective purchasers or merger partners both qualified and capable of acquiring the assets and liabilities of each of the Associations comply with the standards of § 408(m) of the NHA, 12 U.S.C. § 1730(m) (1982);

4. The Bank Board, in making the findings and issuing the approvals contained in this Resolution, has given full and due consideration to the need to minimize the cost of financial assistance, the maintenance of specialized depository institutions, and the priorities and purposes of § 408(m) of the NHA, 12 U.S.C. § 1730a(m) (1982);

5. The Acquisition and the Mergers would lessen the risk to the FSLIC;

6. No other offer was made to acquire all of the Associations;

7. No offeror both qualified and capable of acquiring any of the Associations made an offer to acquire any of the Associations in a form and with conditions acceptable to the FSLIC the estimated cost of which was within the lesser of 15 percent or $15 million of the cost of the offer of the Applicants to acquire all the Associations;

8. The offer of the Applicants to acquire all the Associations presents the lowest expense and least risk to the FSLIC of any proposal submitted for any of the Associations;

9. The offer of the Applicants is substantially less costly to the FSLIC than any alternative proposal or proposals; and

RESOLVED FURTHER That the Bank Board, as operating head of the FSLIC, hereby approves the Acquisition and the Mergers pursuant to § 408(m) of the NHA, 12 U.S.C. § 1730a(m) (1982); and

Approval of Mergers and Increase of Insurable Accounts

RESOLVED FURTHER, That the Mergers are hereby approved and authorized, and the application for approval of the Mergers is hereby deemed to be in substantial compliance with the provisions of § 546.2 of Federal Regulations, 12 C.F.R. § 546.2 (1987), and the increase in the accounts of the New Federal of an insurable type by reason of the Mergers is hereby approved pursuant to § 563.22 of the Insurance Regulations, 12 C.F.R. § 563.22 (1987); *provided* that:

(1) Within five (5) days following the date and time at which the Acquisition and the Mergers become effective ("Effective Date"), New Federal shall submit to the Supervisory Agent an opinion of counsel, in a form approved by the OGC, stating that the Acquisition and the Mergers have been consummated in accordance with the Acquisition Agreement, the Merger Agreements, the charter and bylaws of New Federal, this Resolution, and applicable law; and

(2) Within sixty (60) days following the Effective Date, or within such period of time as is permitted in writing by the Supervisory Agent, New Federal shall submit evidence to the FSLIC or an agent thereof that New Federal has given notice in writing, in a form approved by the OGC, to each accountholder who had an account in New Federal or an Association prior to the Effective Date, and the total of whose withdrawable accounts in New Federal will exceed the sum of $100,000 as a result of the Acquisition and the Mergers, (a) of the effect of the Acquisition and the Mergers on the extent of the accountholder's insurance coverage, and (b) that accounts acquired by New Federal from the Associations shall have separated insurance that shall terminate at the end of six (6) months from the Effective Date, or, in the case of certificate accounts, at the earliest maturity date of such accounts following six (6) months after the Effective Date; and

(3) On or before the Effective Date, New Federal shall have entered into the Merger Agreements; *provided* that the final forms of such agreements have been approved by the OGC; and

RESOLVED FURTHER, That the Bank Board, pursuant to § 552.15 of the Federal Regulations, 12 C.F.R. § 552.15 (1987), deems it necessary, in order to avert the imminent failure of each Acquired Association, to waive or deem inapplicable certain provisions of § 552.13 of the Federal Regulations, 12 C.F.R. § 552.13 (1987), and hereby deems inapplicable and waives paragraph (f), (i), (j), (l) and (m), of § 552.13; and

Grounds for Financial Assistance

RESOLVED FURTHER, That the Bank Board, as

operating head of the FSLIC, hereby determines, pursuant to §§ 406(f)(1)-(4) of the NHA, 12 U.S.C. §§ 1729(f)(1)-(4) (1982), that (1) financial assistance and indemnifications by the FSLIC are necessary to prevent the default of each Association and to facilitate the Acquisitions and the Mergers, and (2) the amounts of such assistance and indemnifications to be provided in accordance with the terms and conditions of the proposed Assistance Agreement would not exceed the amount reasonably necessary to save the cost of liquidating the Associations, including the payment of their insured accounts; and

RESOLVED FURTHER, That the proposed Assistance Agreement and Note are hereby approved, and the Director or the Director, Financial Assistance Division, Office of the FSLIC, or his designee ("FAD Director"), is hereby authorized to execute on behalf of the FSLIC an agreement in the form or substantially in the form of the proposed Assistance Agreement, and a promissory note in the form or substantially in the form of the proposed Note, *provided* that the final forms of such agreement and such note have been approved by the OGC, and

RESOLVED FURTHER, That the Director or the FAD Director is authorized to take such further actions as may be necessary or appropriate to exercise the rights and fulfill the obligations of the FSLIC contained in the Assistance Agreement and the Note; and

Subordinated Debt

RESOLVED FURTHER, That the Bank Board, as the operating head of the FSLIC, finds that the Acquisition and the Mergers constitute a supervisory situation

within the meaning of § 563.8-1 of the Insurance Regulations, 12 C.F.R. § 563.8-1 (1987), and New Federal's issuance of such Subordinated Debenture is hereby approved by the Bank Board, as operating head of the FSLIC, pursuant to § 563.8-1 of the Insurance Regulations 12 C.F.R. § 563.8-1 (1987); and

Prevention of Probable Failure

RESOLVED FURTHER, That the Bank Board finds that approval of the Acquisition, the Mergers and the acquisition of control of New Federal by the Acquirer pursuant to this Resolution is necessary to prevent the probable failure of each Association; and

Supervisory Acquisition and Mergers

RESOLVED FURTHER, That the Bank Board finds and determines that the Acquisition and the Mergers pursuant to this Resolution are instituted for supervisory reasons; and

RESOLVED FURTHER, That the Bank Board, as operating head of the FSLIC, finds that the acquisition of each Association by New Federal by reason of the Acquisition and the Mergers are acquisitions under § 406(f) of the NHA, 12 U.S.C. 1729(f) (1982), and is deemed a supervisory case; and

Forbearances

RESOLVED FURTHER, That the Secretary or an Assistant Secretary to the Bank Board is authorized and directed to send to New Federal a letter concerning supervisory forebearances by the Bank Board and the FSLIC with respect to certain regulatory requirements (a copy of which forbearance letter is in the Minute

Exhibit File), *provided* that the final form of such letter shall be approved by the OGC; and

Employment Contracts

RESOLVED FURTHER, That, pursuant to § 563.39(b)(5) of the Insurance Regulations, 12 C.F.R. § 563.39(b)(5) (1987), all obligations of each Acquired Association under any employment contracts of each Acquired Association are hereby terminated by the Bank Board; and

Accounting

RESOLVED FURTHER, That the Acquisition and the Mergers shall be accounted for, and New Federal shall report to the Bank Board and the FSLIC, in accordance with generally accepted accounting principles prevailing in the savings and loan industry, as accepted, modified, clarified, or interpreted by applicable regulations of the Bank Board and the FSLIC, except to the extent of the following departures from generally accepted accounting principles:

(a) Twenty-one million dollars of the initial contribution by the Corporation to New Federal, and five million dollars of the principal amount of the Subordinated Debenture issued to the FSLIC, pursuant to § 6 of the Assistance Agreement, shall be credited to the regulatory capital account of New Federal; and

(b) The value of any unidentifiable intangible assets resulting from accounting for the Acquisition and the Mergers in accordance with the purchase method of accounting may be amortized by New Federal over a period not in excess of

twenty-five (25) years by the straight line method; and

RESOLVED FURTHER, That, no later than ninety (90) days following the Effective Date, New Federal shall furnish an analysis, accompanied by a concurring opinion from its independent certified public accountants (which will indicate that the Acquisition and the Mergers were consummated in accordance with generally accepted accounting principles except as otherwise authorized by the Bank Board), satisfactory to the Supervisory Agent and the ORPOS, which shall (a) specifically describe, as of the Effective Date, any intangible assets, including goodwill and the discount and premiums arising from the Acquisition and the Mergers, to be recorded on New Federal's books, and (b) substantiate the reasonableness and conformity with regulatory requirements of the amounts attributed to intangible assets, including goodwill and the discount and premiums, and the related amortization periods and methods; and

Tax Certification

RESOLVED FURTHER, That the Bank Board finds and hereby certifies that the ground set forth in § 5(d)(6)(a)(i) of the HOLA, 12 U.S.C. § 1464(d)(6)(A)(i) (1982), exists with respect to the each Association in that the each Association is insolvent in that its assets are less than its obligations to its creditors and others, including its withdrawable accountholders; and

RESOLVED FURTHER, That the Bank Board finds that the record before it contains nothing to show, or from which it could be inferred, that any Association has intentionally placed itself in the position of being insol-

vent for the purpose of obtaining any tax advantages; and

RESOLVED FURTHER, That the Secretary or an Assistant Secretary to the Bank Board is hereby authorized and directed to issue and send to New Federal a letter with respect to each Association certifying on behalf of the Bank Board the matters set forth in the two immediately preceding resolving paragraphs, and the Secretary or Assistant Secretary is hereby authorized to provide copies of such letters to any agency of the United States upon request; and

Secondary Reserve

RESOLVED FURTHER, That the FSLIC hereby provides that the pro rata share, if any, of each Association in the statutorily prescribed amount defined by § 404(e)(2)(D) of the NHA, 12 U.S.C. § 1727(e)(2)(D) (1982), shall be transferred to New Federal, effective as of the Effective Date; and

Federal Home Loan Bank Stock and Membership

RESOLVED FURTHER, That the transfer to New Federal of the stock in the Bank of each Acquired Association and of the stock in the Federal Home Home Loan Bank of Atlanta, of the Closed Association, is approved, effective as of the Effective Date, and that, upon such transfer, the memberships of the Associations in the respective Federal Home Loan Banks shall cease; and

Cancellation of Certificates of Insurance and Federal Charters

RESOLVED FURTHER, That the Secretary or an

Assistant Secretary to the Bank Board is hereby directed to cancel each Association's certificate of insurance upon its surrender to the FSLIC; and

RESOLVED FURTHER, That as of the Effective Date, the federal charters of First Federal and Peoples will be automatically cancelled; and

RESOLVED FURTHER, That First Federal and Peoples are hereby directed to surrender their charters to the Bank Board on the Effective Date; and

Holding Companies

RESOLVED FURTHER, That the Bank Board, as operating head of the FSLIC, has taken into consideration the financial and managerial resources and future prospects of the Applicants and New Federal and the convenience and needs of the communities to be served by New Federal; and

RESOLVED FURTHER, That the Bank Board, as operating head of the FSLIC, finds that the acquisition of control proposed in the Application satisfies the approval standards of § 408(e)(2) of the NHA, 12 U.S.C. § 1730a(e)(2) (1982); and

RESOLVED FURTHER, That the acquisition of control of New Federal by the Applicants is hereby approved pursuant to § 408(e)(1)(B) of the NHA, 12 U.S.C. § 1730a(e)(1)(B) (1982), § 408(m) of the NHA, 12 U.S.C. § 1730a(m) (1982) and § 574.3 of the Insurance Regulations, 12 C.F.R. § 574.3 (1987), *provided* that:

1. The Applicants and the Acquirer shall obtain the approval of their respective boards of directors for consummation of the transactions set forth herein, and shall

execute or authorize the execution of all documents necessary to consummate such transactions in accordance with all applicable statutory and regulatory requirements and the conditions imposed by this Resolution, and shall provide to the OGC satisfactory evidence of all required approvals and authorizations by such boards of directors;

2. The issuance and sale of New Federal's stock to the Acquirer in accordance with the terms of the proposed Plan of Organization as executed shall be completed promptly upon the issuance of a Federal stock charter to New Federal;

3. The stock issued by New Federal shall be evidenced by certificates in the form of the proposed certificate, which is hereby approved (a copy of which is in the Minute Exhibit File), including a statement to the effect that the shares are restricted as to transfer as prescribed in the Regulatory Capitol Maintenance Agreement among the Applicants, the Acquirer, New Federal and the Corporation;

4. The Acquirer shall, promptly after making full payment for New Federal's stock, elect New Federal's board of directors, and the board of directors shall, promptly after being elected, elect officers of New Federal;

5. The Acquirer shall submit to the Bank Board, promptly after completion of the acquisition of New Federal's stock, a letter stating that the purchase was made solely for the purposes of investment and not with a view towards resale or distribution; that the Acquirer was provided with all material information requested concerning New Federal and the acquisition; that at the

time of consummation of the acquisition no material adverse change had occurred with respect to the business and operations of the Acquirer since the date of any financial statements submitted in connection with the proposed acquisition; that no expense has been incurred by the Acquirer in the organization of New Federal which is chargeable to New Federal and no such expense will be incurred; and that no funds were accepted for deposit by New Federal until organization of New Federal was completed in accordance with the Plan of Organization as executed and the terms of this Resolution;

6. The board of directors of New Federal shall approve, and the President or another officer shall be authorized to execute and shall execute, an Assistance Agreement, an Acquisition Agreement and a Regulatory Capital Maintenance Agreement, which shall be substantially in the forms of the proposed agreements (copies of which are in the Minute Exhibit File), *provided* that the final form of each shall be approved by the OGC; and the board of directors of New Federal shall authorize the officers of New Federal to take all other actions necessary to effect the organization of New Federal and to effect the acquisition of and the Mergers;

7. The Applicants and the Acquirer shall execute an Assistance Agreement and a Regulatory Capital Maintenance Agreement which shall be substantially in the forms attached as exhibits to the Plan of Organization (copies of which are in the Minute Exhibit File), *provided* that the final form of each shall be approved by the OGC;

8. Each dividend notification filed by New Federal

pursuant to the provisions of § 584.5 of the Holding Company Regulations 12 C.F.R. § 584.5 (1987), shall demonstrate compliance with § 5(k) of the Regulatory Capital Maintenance Agreement;

9. New Federal shall serve the communities previously served by the Associations and adopt the Community Reinvestment Act ("CRA") statement, delineation of the community, and programs to implement the CRA policies of the Associations effective upon the Effective Date; and thereafter New Federal shall seek to maintain a satisfactory CRA rating;

10. New Federal shall continue the savings and lending programs of and offer accounts and make loans on the same terms as the Associations until such time as the board of directors of New Federal authorizes changes therein consistent with applicable law and regulations;

11. New Federal shall promptly file with the Bank Board a copy of the Plan of Organization on which its President or other duly authorized officer shall have certified to the completion of the steps of organization as described therein;

12. New Federal shall promptly file with the Bank Board five copies of its charter and bylaws in the forms herein approved;

13. New Federal shall operate in accordance with the business plan submitted with the Application. The board of directors of New Federal will be responsible for review of New Federal's financial condition and operations as they relate to the business plan to assure New Federal's adherence to the business plan and, by

the 20th day after each quarter-end, New Federal shall provide the Supervisory Agent with a report evidencing New Federal's compliance with the business plan. Material deviations from the business plan shall not be undertaken without the prior written approval of the Supervisory Agent;

14. Within 30 days of the Effective Date, and thereafter as applicable, New Federal shall have submitted to the Supervisory Agent the original copy of the "Oath of Director of FSLIC-Insured Institution" properly executed by each of the institution's directors;

RESOLVED FURTHER, That Statesman shall stipulate, in a form satisfactory to the PSA, that at such time as it becomes non-diversified, it shall, no later than 60 calendar days prior to the beginning of each fiscal year, file a statement with the PSA of anticipated issuances of debt in the upcoming fiscal year by itself and each of its noninsured subsidiaries prepared both on a consolidated (excluding any insured subsidiary) and unconsolidated basis in a form satisfactory to the PSA ("Proposed Debt Budget"). Unless notified in writing by the PSA within 15 business days following receipt of the Proposed Debt Budget, or amendment thereto, the Proposed Debt Budget shall be considered complete. If the PSA does not object to the Proposed Debt Budget within 45 calendar days following the receipt of a complete Proposed Debt Budget, the Proposed Debt Budget shall be deemed approved, and Statesman and its uninsured subsidiaries shall have the right to issue, sell, renew, guarantee or assume indebtedness as set forth in the Proposed Debt Budget without further filing with respect thereto. Any additional debt not covered by the Proposed Debt Budget will be subject to an Application H-(g) or revised Debt Budget which would be subject to

the same approval process as above. The Corporation or its delegate may terminate this approval given pursuant to 12 U.S.C. § 1730(g) and 12 C.F.R. § 584.6 or may amend the terms of such approval for good and reasonable cause after providing Statesman with notice and an opportunity for response; and

RESOLVED FURTHER, That Statesman and its subsidiaries that are not insured institutions under 12 U.S.C. § 1730(g) will comply with all covenants in their debt instruments and agreements, and any material default with regard to such covenants will be promptly cured within 30 days. All uncured defaults will be reported to the PSA within 45 days after their occurence; and

Approval of Cross-Marketing Activities

RESOLVED FURTHER, That the Bank Board determines that the cross-marketing activities described in the Application, if conducted in the manner and only to the extent requested in the Application and in accordance with the conditions set forth below, would not be detrimental to the interests of New Federal's savings account holders or to the insurance risk of the FSLIC; and

RESOLVED FURTHER, That the Bank Board, as operating head of the FSLIC, pursuant to its authority under § 408(m), 12 U.S.C. § 1740a(m) (1982), hereby approves New Federal's engaging in the cross-marketing activities described in the Application, in the manner and to the extent described, *provided* that:

1. Purchasers of insurance products of affiliates of New Federal sold by employees of New Federal must

be informed that such products are in no way related to FSLIC insurance; and

2. New Federal may cross-market only with regard to existing lines of business or areas of business activities of the Applicants and their affiliates without prior approval of the PSA; and

Approval and Waivers for Affiliated Transactions

RESOLVED FURTHER, That the Bank Board determines that the affiliated transactions described in the Application, if consummated in accordance with the conditions stated below, would not be detrimental to the interests of New Federal's savings account holders or to the insurance risk of the FSLIC; and the Bank Board, as operating head of the FSLIC, consistent with the policy set forth in § 571.7 of the Insurance Regulations, 12 C.F.R. § 571.7 (1987), and pursuant to § 584.3(b) of the Holding Company Regulations, 12 C.F.R. § 584.3(b) (1987), approves such transactions, *provided* that:

1. Affiliate transactions shall not violate New Federal's internal policies and practices for transactions with third parties:

2. Statesman and New Federal must maintain documentation supporting the conclusion that affiliate transactions are fair to and in the best interests of New Federal and that all prices, rates or charges assessed are competitive in the relevant markets;

3. The PSA is hereby authorized to revoke the authority to engage in a particular affiliated transaction or types of transactions (a) if the PSA determines, in the exercise of reasonable judgment, that the terms or rates of such transaction or types of transactions are not comparable to terms or rates between New Federal and

third parties engaged in similar activities or are not comparable to competitive local market rates and terms (provided that the PSA shall provide New Federal with an opportunity to justify or cure the particular objections to such transaction) or (b) the PSA determines, in the exercise of reasonable judgment, that the transaction or types of transactions poses an undue risk to New Federal;

4. The authorization to engage in affiliate transactions shall not be deemed a waiver of any other Bank Board regulations, including, but not limited to, the restriction on direct investments and loans to one borrower;

5. Permissible affiliate transactions are limited to those related to existing businesses of the Applicants or any of their affiliates without prior PSA approval;

6. Beginning in 1989 New Federal must submit an annual report to the Supervisory Agent indicating the types and amounts of affiliate transactions to be entered into in the subsequent fiscal year. If the Supervisory Agent does not object to such transactions within thirty days after the submission of the annuual report, such transactions shall be deemed approved. The Supervisory Agent shall make any such objection only in the exercise of reasonable judgment. If New Federal anticipates significant deviations from the annual report, it must file an amended report;

7. New Federal must submit quarterly reports to the Supervisory Agent indicating the types and amounts of affiliate transactions entered into during the particular quarter;

8. Activities conducted by a "securities affiliate" of

the Acquirer shall be conducted in accordance with the following conditions:

(a) the securities affiliate shall be operated in such a manner that maintains its separate corporate identity;

(b) the activities of the securities affiliate shall be conducted in areas that are identifiable and physically distinct from areas where the insured institution controlled by Acquirer conducts the business of receiving deposits;

(c) insured institutions that are controlled by Acquirer and any securities affiliate shall take measures necessary to ensure that officers, directors and employees of such insured institution who are also officers, directors or employees of any such securities affiliate are aware of and undertake to abide by Federal Home Loan Bank Board policy statements on conflicts of interest, 12 C.F.R. § 571.7, and usurpation of corporate opportunities, 12 C.F.R. § 571.9, and any additional or successor statements of policy or rules addressing these subjects;

(d) any employee of a securities affiliate that is also an employee of any insured institution controlled by Acquirer that deals with customers at a teller window or comparable area may not receive comissions or other compensation related to the volume of sales of securities by the securities affiliate and any such employee that deals with customers at a teller window or comparable area in connection with services or investments offered by the insured institution

shall not also deal with customers in connection with products or services offered by any securities affiliate;

(e) advertising for the securities affiliate's products and services shall clearly and prominently distinguish such products and services and the operation of such securities affiliate from the operation of any insured institution controlled by Acquirer;

(f) the securities affiliate shall conduct its operation independent from insured institution controlled by Acquirer, pursuant to separate and independent policies and procedures, and any insured institution controlled by Acquirer shall conduct its operations independent from the securiteis affiliate, pursuant to separate and independent policies and procedures;

(g) Acquirer, any securities affiliate and any insured institution controlled by Acquirer shall take measures necessary to make customers aware that (a) the securities affiliate is a separate organization from the insured institution and (b) in the case of investments recommended, offered, or sold by the securities affiliated that are not insured by the FSLIC or the FDIC, not guaranteed by the insured institution and are not otherwise obligations of the insured institution, that such investments are not obligations of the insured institution and are not so insured or guaranteed; and

(h) all transactions between any insured institution controlled by Acquirer and the securities affiliate, including where the insured institution acts in a fiduciary or co-fiduciary capacity in securities transactions through the insured institution, trust department, shall be on terms that are demonstrably comparable to available alternative transactions with unrelated parties.

9. With respect to any securities affiliate of the Acquirer that is engaged in the business of underwriting, distributing or dealing in securities of any type, New Federal shall not during the first 180 days following the Effective Date, without obtaining the prior writtten approval of the PSA, directly or indirectly:

(a) extend credit in any manner to a securities affiliate or a subsidiary thereof;

(b) purchase for its own account assets of a securities affiliate or a subsidiary thereof; *provided, however,* that subparagraphs (a) and (b) above do not apply to any extension of credit by an insured bank or insured institution made to acquire or sell any securities of the United States if:

(i) the extension of credit is to be repaid on the same calendar day;

(ii) the extension of credit is incidental to the clearing of transactions in those securities through that insured bank or insured institution; and

(iii) both the principal of and the interest on the extension of credit are fully secured by securities of the United States;

(c) issue a guarantee, acceptance, or letter of credit, including an endorsement or standby letter of credit, for the benefit of a securities affiliate or a subsidiary thereof;

(d) extend credit in any manner to any investment company advised by or the shares of which are distributed by a securities affiliate;

(e) extend credit, or issue or enter into a standby letter of credit, asset purchase agreement, indemnity, guarantee, insurance, or other facility, for the purpose of enhancing the marketability of a securities issue underwritten or distributed by a securities affiliate;

(f) knowingly extend or arrange for the extension of credit, directly or indirectly, secured by or for the purpose of purchasing any security while, or for thirty days after, that security is the subject of a distribution in which a securities affiliate of that insured bank or insured institution participates as an underwriter or a member of a selling group;

(g) extend credit to an issuer of securities underwritten by a securities affiliate for the purpose of paying the principal of those securities or interest for dividends on those securities;

RESOLVED FURTHER, That for the purposes of paragraphs 8 and 9 above, (i) a "securities affiliate" means a company that engages in securities brokerage, investment advisory or other activities permitted for brokers or dealers registered under the Securities Exchange Act of 1934 or for investment advisers registered under the Investment Advisors Act of 1940, underwriting, distributing or dealing in securities of any type, except that such term shall not include insurance products deemd to be securities, including and without limitation variable annuities and variable life insurance; (ii) the activities permitted by such paragraphs shall be limited to those specifically set forth in the Application, unless the PSA grants prior approval in writing for additional activities; and (iii) nothing in any resolution contained herein shall be deemed a waiver of any rules, regulations or Bank Board actions applicable to the permitted activities and New Federal shall be bound by such rules, regulations and actions; and

Waiver of Certain State Laws

RESOLVED FURTHER, Pursuant to § 408(m) of the NHA, 12 U.S.C. § 1730a(m) (1982), the Bank Board hereby waives the laws of any state: (1) that prohibit, restrict or limit the affiiliation between Statesman or any of its subsidiaries engaged in insurance activities with New Federal, or (2) that prohibit, restrict or limit any insurance activities of Statesman, or any of its subsidiaries, as a result of such affiliation. However, this waiver does not apply to state laws that limit the percentage of an insurance company's assets that may be invested in any one subsidiary and other similar state law prohibitions, restrictions and limitations that are not triggered by the fact that a subsidiary is engaged in the savings and loan or banking business; and

Home Office

RESOLVED FURTHER, That New Federal's home office is hereby temporarily redesignated to be located in Waterloo, Iowa and such location shall revert to Des

Moines, Iowa upon New Federal's selection of a site there and the PSA's approval of such site; and

Branch Offices

RESOLVED FURTHER, That maintenance of the home office and branch offices of the Associations as the home office and branch offices of New Federal, upon the Acquisition and the Mergers becoming effective, is hereby approved; and

Management Interlock

RESOLVED FURTHER, That the Bank Board hereby finds that, pursuant to § 408(m) of the NHA, 12 C.F.R. § 1730a(m) (1982), the provisions of § 563f.3 of the Insurance Regulations, 12 C.F.R. § 563f.3 (1987), shall not apply to Simon W. Casady in his capacity as director of Statesman, *provided* that the Supervisory Agent may terminate the foregoing exemption at any time; and

Effective Date

RESOLVED FURTHER, That the Acquisition and the Mergers shall be effective upon the execution by the appropriate parties of the Assistance Agreement.

By the Federal Home Loan Bank Board

John M. Buckley, Jr.
Secretary

March 14, 1988
R R R

Virgil Maxwell
President
Statesman Bank for Savings, FSB
100 Des Moines Building
Des Moines, IA 50309

Dear Mr. Maxwell:

In connection with the approval by the Federal Home Loan Bank Board ("Bank Board") of the assisted acquisition of First FSB of Waterloo, Peoples FS&LA of Waterloo, Perpetual S&LA, all of Waterloo, Iowa, and First Federated SB of North Palm Beach, North Palm Beach, FL, ("Associations") by Stateman Savings Holding Company (SSHC") via its wholly-owned subsidiary Statesman Bank for Savings, FSB ("SBS") the following forbearances are hereby granted.

The acquisition of control of the associations by SBS has been deemed to be an acquisition instituted for supervisory reasons. Therefore, the Federal Savings and Loan Insurance Corporation ("FSLIC") will forbear, for a period not to exceed five years folllowing consummation of the acquisition, from exercising its authority under Section 563.13 of the Insurance Regulations, for any failure of SBS to meet the regulatory capital requirements of Section 563.13 arising solely from (a) scheduled items attributable to the assets of the associations existing at the effective date of the acquisition, or that are or become classified assets pursuant to Sections 561.16c, 563.17-2 and 571.1a of the Insurance Regulations; (b)

operating loses on acquired assets, excluding those losses covered by FSLIC assistance, (c) capital losses, excluding those losses covered by FSLIC assistance, sustained by the associations upon disposition of acquired assets; (d) the associations' liabilities, including averaged liabilities as of the effective date of the acquisition; or the associations' net worth deficiency existing at the effective date of the acquisition.

For a period of one year following the effective date, in determining whether a penalty shall be assessed against or paid by SBS pursuant to Section 523.12 (Deficiencies and Penalties) of the Rules and Regulations for the Federal Home Loan Bank System ("Bank Regulations"), the liquidity requirements of Section 523.11 (Liquidity Requirements) of the Bank Regulations as applied to SBS shall be reduced by (1) the amount of the associations' liquidity deficiencies existing at the effective date and (2) any aggregate net withdrawals (excess of withdrawals over case savings received) from the associations' offices after the effective date.

It is the FSLIC's intention $21 million of the cash contribution to be made to SBS pursuant to an assistance agreement to be entered into between the FSLIC and SBS and the $5 million subordinated debenture are to be a credit to SBS regulatory capital; therefore, for regulatory accounting purposes, SBS may book such contribution as a direct addition to its regulatory capital.

Not alter than 90 days following the effective date of the merger, SBS shall submit to the

Supervisory Agent an independent certified public accountant's opinion that SBS has accounted for the merger in accordance with generally accepted accounting principles except that as herein provided by the Board, for purposes of reporting to the Board the cash contribution by the FSLIC to SBS with respect to the associations, pursuant to the assistance agreement, and the $5 million subordinated debenture shall be booked as a direct credit to SBS.

SBS shall be given a reasonable period of time, but not to exceed 3 years, to phase out, dispose of or discontinue in an orderly manner, any acquired investments, activities, or operations inconsistent with the Home Owners Loan Act of 1933, as amended, provided that such action is taken at the earliest possible date without material loss to SBS.

SBS shall not for a period not to exceed 3 years, be deemed in violation of any of the provisions of Section § 545.74 (Service Corporations) of the Rules and Regualtions for the Federal Savings and Loan System by reason that any activities of a service corporation acquired as a part of the merger, at or before the effective date, are not approved or authorized by the Home Owners Loan Act of 1933, as amended.

Section 563.9-3 (Loans to One Borrower) of the Insurance Regulations limits the aggregate amount of loans that may be made to one borrower. The Bank Board will forbear from taking any enforcement/supervisory action for a violation of this Regulation arising from the transfer

of the two loans $30 million loan now placed with Bank One, Indianapolis, N.A., to the Institution if such loans are placed on the Institution's books at the same terms, rates, conditions, and restrictive covenants, and with the same collateralization as now exists on the Bank One loan. However, Statesman shall exercise its best good faith efforts to avoid the placement of this loan on SBS' books. Thses loans consist of a $20 million loan to Statesman and a $10 million loan to Statesman's Employee Stock Ownership Plan, which is guaranteed by Statesman. The Bank Board will grant the same forbearance for a loan or line of credit not to exceed $17 million for the first three months and $15 million thereafter for the purpose of making a payments to the Government National Mortgage Association provided that the term of the loan/line does not exceed one year and the rate on the loan is a market rate.

Section 584.3 (Transactions with Affiliates) of the Insurance Regulations prohibits an institution from accepting the stock of any affiliate as collateral security for any loan or extension of credit made by such institution. The Bank Board will forbear from taking any enforcement/supervisory action for a violation of this Regulation arising from the transfer of the $30 million in loans, as described in the preceding paragraph of this letter.

Section 584.3 (Transactions with Affiliates) of the Insurance Regulations prohibits an institution from investing any of its funds in the stock of any affiliate. The Bank Board will forbear from taking

any enforcement/supervisory action for a violation of this Section arising from the preferred stock of Statesman Group, Inc. ("Statesman") being held by SBS. Upon consummation of the transaction, $12.6 million of Statesman's preferred stock will be transferred to SBS through SSHC. The number of shares of the preferred stock held by SBS may decrease annually according to the income sharing agreement as defined in the Assistance Agreement. Specifically, in any year where SBS' gross book income (as defined in the Assistance Agreement) exceeds $5 million, $2 million of the Statesman's preferred stock held by SBS will be transferred to FSLIC. The term of the income sharing arrangement with FSLIC expires in ten years. Ten years following the acquisition of SBS by SSHC and Statesman, SBS will commence redemption of the entire remaining holdings of Statesman's preferred stock at the rate of $3 million per year until the entire amount has been redeemed.

Investment in the preferred stock of Statesman is not an authorized investment as specified in Section 5 of the Home Owners Loan Act of 1933. Therefore, The Bank Board will forbear from taking supervisory/enforcement action against SBS for the violation. Arising from the investment is preferred stock of Statesman being held by SBS as described in the preceding paragraph.

Section 563.9-8 (Regulation of equity risk investment on equity securities, real estate, service corporations, operating subsidiaries, certain land loans, and nonresidential construction loans) of the Insurance Regulations limits the aggregate

amount that can be invested in "equity risk investments." The Bank Board will forbear from taking enforcement/supervisory action with regard to SBS' holding of the 12.6 million worth of preferred stock under the same terms as described in paragraph 9 above.

The forbearances or waivers extended by this letter do not relieve SBS of its continuing obligations to maintain records of its regulation capital condition and to report its financial condition in accordance with applicable regulatory requirements. This letter does not and shall not be construed to constitute forbearance or waiver by the Bank Board or the FSLIC with respect to any regulatory or other requirements other than those encompasses within the preceding paragraphs 1 through 5. Other than the actions to enforce the regulatory requirements waived in accordance with paragraphs 1 through 5 and the statutory provisions authorizing imposition of the waived requirements, insofar as such requirements are waived, the Bank Board and the FSLIC expressly reserve all of their statutory rights and powers with respect to SBS including, without limitation, those under Section 5 of the Home Owner's Loan Act of 1933 and Sections 406 and 407 of the National Housing Act.

By the Federal Home Loan Bank Board

John M. Buckley, Jr.
Secretary

OVERSIGHT ON THE CONDITION OF THE FINANCIAL SERVICES INDUSTRY

HEARINGS

BEFORE THE

COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

RESULTS OF THE AUDIT OF THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION (FSLIC), 1987, FINANCIAL STATEMENTS AND THE INCREASING FUNDS AND SAVINGS AND LOAN INDUSTRY PRESENTED BY THE INCREASING NUMBER OF INSOLVENT AND INADEQUATELY CAPITALIZED INSTITUTIONS

AND

THE REPORT OF THE BANK REGULATORS ON THE VARIETY OF DEVELOPMENTS IN RECENT YEARS THAT MAKE SATISFACTORY EARNINGS FOR THE BANKING SYSTEM MORE DIFFICULT TO ACHIEVE. HOWEVER, THE OUTLOOK FOR THE IMMEDIATE FUTURE IS CAUTIOUSLY OPTIMISTIC

MAY 19, 25, AND 26, 1988.

Printed for the use of the Committee on Banking, Housing and Urban Affairs

U.S. GOVERNMENT PRINTING OFFICE
88-358 WASHINGTON : 1988

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

STATEMENT OF
M. DANNY WALL, CHAIRMAN
FEDERAL HOME LOAN BANK BOARD
BEFORE THE
COMMITTEE ON BANKING, HOUSING AND
URBAN AFFAIRS

U.S. SENATE

MAY 26, 1988

Index

		Page
I.	Financial Condition of the Thrifts Industry	1
II.	Overview of FSLIC	5
	A. Recapitalization	5
	B. Insurance Premiums	8
	C. Current Condition of FSLIC	11
	D. Projection of Future Amount of Capital Needed	13
III.	Bank Board Approaches to Problem Institutions	14
	A. The Southwest Plan	14
	B. Other FSLIC Actions	17
	C. Tax and Others FSLIC-Related Legislative Interests	19
	D. Management Consignment Program	21
	E. Capital Forbearance	22
IV.	Bank Board Actions to Maintain the Profitable Segment of the Industry	23
	A. Supervisory Actions	23
	B. Enforcement Activities	26
	C. Strengthened Capital Requirements	28
	D. Case-by-case Capital Regulation	29
	E. Movement to GAAP Accounting as Required by CEBA	30
V.	Conclusion	30

In addition to consolidating institutions that had contributed to the cost of funds problem in issue, Southwest will decrease duplications and operating cost through a substantial reduction in the number of branches of the acquired institutions, concentrating on areas where there is duplication of branches.

The Board is committed to moving the Southwest Plan forward as expeditiously as possible. We are pleased that the consolidations that have been completed to date are adhering to the overall objectives that the Board established when it formulated the plan. A competitive environment is being enhanced, redundancies are being eliminated, and capable management is taking over. Significantly, from FSLIC's perspective, the use of cash to resolve problems is being minimized, and the FSLIC fund will have a share of the future profits of assisted institutions.

B. *Other FSLIC Actions*

During 1987 FSLIC resolved 47 troubled institutions at an estimated cost of $3.7 billion. Thirty-one of these cases were resolved by assisted sales to other financial institutions or to corporate and private investors, saving FSLIC approximately $400 million over the cost of liquidating the 31 institutions. From the enactment of the CEBA until the end of 1987, the Board completed sixteen assisted acquisitions and four liquidations, for an average of approximately one transaction per week. The Bank Board has set a goal for FSLIC to continue consummating transactions at the same pace this year. This goal is in addition to case resolutions under the Southwest Plan.

Given the size of its caseload and the available resources, FSLIC prioritizes cases according to the

cost-effectiveness of resolution. In most cases, the preferred resolution is to sell a troubled institution because that is normally the least costly alternative for FSLIC. In addition, an assisted acquisition offers the potential of preserving the viable aspects of the troubled institution (such as its branch structure, its case deposit base, and its employees), while providing new capital to the industry in a manner that avoids the cost to FSLIC of operating a receivership.

During late 1986 and early 1987, FSLIC's marketing efforts were severely curtailed because of the depleted condition of the insurance fund. However, FSLIC embarked on a stepped-up marketing program late in the second quarter of 1987 and by year-end had marketed 47 institutions with total assets exceeding $16.5 billion and liabilities of $18.5 billion.

Through May 25, 1988, FSLIC was successful in resolving 23 troubled institutions (with consolidated liabilities of approximately 4.9 billion) for an estimated cost of 1.32 billion. Thirteen of these cases, with total liabilities of $3.5 billion, were resolved by assisted sales to other financial institutions or to corporate and private investors. These transactions saved the FSLIC approximately $252 million over the cost of liquidating the institutions. In addition, the Southwest Plan has resulted in savings to FSLIC of $532 million, for a total savings of $784 million this year.

For the second quarter of 1988, FSLIC projects 19 case resolutions. Twenty-nine institutions with assets totaling $5.7 billion are tentatively scheduled for marketing. FSLIC expects to market through both mail solicitations and telephone solicitations. The first and second quarter marketing efforts coupled with the institutions marketed during the second half of 1987 totaled over 100 institutions with assets exceeding $48 billion dollars.

One of the more significant acquisitions arranged by FSLIC apart from those made under the Southwest Plan involved the acquisition last March of four troubled institutions by the Statesman Group, Inc. ("Statesman"). This transaction is noteworthy not only for the number of institutions involved, but also because it represented the Board's first exercise of its reinstated authority under section 408(m) of the NHA to override restrictions on cross-marketing of products and services between subsidiaries of the holding company and the newly acquired thrifts.

Section 408(m) of the NHA, first enacted by the Congress in the Garn-St Germain Depository Institutions Act of 1982 and reinstated by CEBA, authorized the Board, with certain limited exceptions, to arrange for acquisitions and mergers of troubled thrift institutions notwithstanding the provisions of any other state or federal law. The reinstatement of section 408(m) in last year's CEBA legislation was a reaffirmation of Congress' original intent that the Bank Board be provided with broad discretion to preempt those laws that would otherwise materially interfere with its ability to negotiate with potential acquirers and to resolve supervisory cases at the lowest possible cost to the FSLIC.

In approving the Statesman acquisition of three insolvent thrift institutions in Iowa and a fourth troubled savings and loan association in Florida, the Board agreed to waive certain cross-marketing restrictions generally applicable to thrift holding companies and their affiliates that could have prohibited the acquired institutions from marketing their affiliates' insurance product and service. A key factor in the Board's decision to grant these waivers was that Statesman's acquisition offer involved less financial assistance from the FSLIC than any other

available alternative. In fact, the financial assistance provided by the FSLIC in connection with these acquisitions was $30 million less than the cost to the FSLIC of liquidating the four institutions. In making this determination, the Board also noted that: (1) but for the acquisitions, Statesman's insurance affiliates would have been able to enter into joint-marketing arrangements with the acquired institutions and to offer their products and services at the branch offices of the thrifts, and (2) the imposition of any cross-marketing restrictions, under the circumstances, would have been a material impediment to the acquisitions. Accordingly, these waivers constituted a proper exercise by the Board of its emergency acquisition authority under section 408(m).

The Statesman transaction also represented a significant step by the Bank Board in permitting an affiliation of a thrift and an investment banking firm. The moratorium on such affiliation contained in section 408(r) of the NHA expired on March 1, 1988, therefore, there is no longer any statutory prohibition on acquisitions of insured institutions by companies with subsidiaries engaged principally in certain securities activities. Even if this section had survived, however, the affiliation between the institutions and Stateman's broker/dealer subsidiary would have been exempt pursuant to Section 408(r)(2)(C) because the institutions would have had total assets of more than $300 million at the time of the acquisition. In approving this acquisition the Board imposed a series of firewall restrictions on the activities of Statesman's subsidiaries in order to insulate the deposits of the insured institutions from the activities of the broker-dealer affiliates.

As you are undoubtedly aware, we are attempting to resolve the problems of the troubled American

Savings and Loan Association of Stockton, CA, ("American") the thrift subsidiary of Financial Corporation of America. The Bank Board continues to monitor the day to day activities of American while striving to find a solution that entails the least cost to FSLIC. On April 21, 1988, the Bank Board agreed to negotiate exclusively with the Robert H. Bass Group, Inc. for a period of 75 days concerning the possible sale of American. These negotiations are ongoing.

C. Tax and Other FSLIC-Related Legislative Interests

It is generally more cost effective for FSLIC to resolve the problems of troubled thrifts through assisted mergers and acquisitions rather than liquidations. In addition to the reduced costs, assisted acquisitions afford additional benefits, such as maintaining public confidence in the financial system by avoiding failures and liquidations of depository institutions.

Since 1981, the tax laws have contained a number of provisions ("the FSLIC tax provisions") that were enacted to help FSLIC fulfill its statutory mandate of protecting the safety and soundness of insured institutions. These provisions are currently set to expire at the end of 1988. We believe these provisions should be extended until the end of 1991 and we ask you to support such an extension.

There are two areas in which the expiring tax provisions affect the FSLIC's ability to arrange for assisted acquisitions of troubled thrift institutions. First, the Internal Revenue Code provides that assistance paid by the FSLIC in connection with an assisted acquisition will not be considered taxable income.[21] The benefit of this provision is not limited

to the troubled institution or the acquirer, it also inures to the benefit of the FSLIC by reducing the amount of assistance otherwise needed. For example, if under current law the FSLIC must pay an acquirer $100 as an inducement to acquire a troubled thrift, the FSLIC may need to pay potential acquirors $150 if that assistance payment is to be subject to tax.

Second, special provisions in the Internal Revenue Code's corporate reorganization rules clarify that a FSLIC-supervised merger or acquisition can qualify as a tax-free reorganization, such that the net operating and built-in tax losses of the troubled institution can be fully utilized by the acquiring institution. Here again, although the nominal benefit of this provision accrues to the acquiring institution, in a very real sense, the benefit inures to the FSLIC as a result of contractual agreements between it and the acquirer requiring that tax benefits enjoyed by the acquiring institution must be accounted for and rotated back to FSLIC.

By making each dollar of FSLIC assistance go further, the extension of these provisions will not only allow FSLIC to resolve a greater number of cases, and to resolve them more quickly than it would if these previsions were allowed to expire, but will, we believe, allow for the most cost effective resolution of these cases from the Federal government's viewpoint. For this reason, we would urge the members of this Committee to encourage your colleagues on the Finance Committee to support an extension of these provisions for an additional three years.

The Board would also support three additional legislative initiatives that would substantially assist FSLIC. Two amendments would clarify authority that has been blurred as a result of recent judicial action and would substantially assist FSLIC in controlling legal and administrative costs. An amendment to

[21]26 U.S.C.A. § 597 (West Supp. 1988).

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

FEDERAL HOME LOAN BANK BOARD
THRIFT FINANCIAL REPORT
Statement of Condition

PREPARED BY:

PHONE NUMBER (Include Area Code): (317) 263-0657

DISTRICT/DOCKET

NAME AND ADDRESS OF INSTITUTION (Please Use Preprinted Label)

UNION FSB OF FRANKTON 06/08528
204 SIGLER STREET
FRANKTON, IN
46044-0000

(REPORT IN THOUSANDS OF DOLLARS)

SECTION A
ASSETS

		BIL	MIL	THOU
MORTGAGE LOANS, CONTRACTS, AND PASS-THROUGH SECURITIES				
CONSTRUCTION LOANS ON:				
1-4 Dwelling Units:	022			453
5 or More Dwelling Units	024			-0-
Nonresidential	026			-0-
PERMANENT MORTGAGES ON:				
1-4 Dwelling Units:				
First Mortgages and Closed-End Junior Liens	031		23	030
Revolving, Open-End Loans	033			-0-
5 or More Dwelling Units	034			46
Nonresidential (Except Land)	036			825
Land	050			-0-
FACILITATING REO SALES	060			524
MORTGAGE-BACKED PASS-THROUGH SECURITIES:				
Insured or Guaranteed by an Agency or Instrument of the U.S.:				
Issued by REMICs	072			-0-
Issued by Other Entities	074		4	603
Conventional:				
Issued by REMICs	082			-0-
Issued by Other Entities	084			-0-
ACCRUED INTEREST RECEIVABLE	090			89
ADVANCES FOR BORROWERS' TAXES AND INSURANCE	100			-0-
CONTRA-ASSETS TO MORTGAGE LOANS, CONTRACTS, AND PASS-THROUGH SECURITIES:				
Loans in Process	110			305
Deferred Loan Fees, Unamortized Premiums and Unaccreted Discounts	121		1	121
Valuation Allowances for Mortgages Held For Sale	129			-0-
Other Valuation Allowances:				
Specific	132			7
General	133			81
NET MORTGAGE LOANS, CONTRACTS, AND PASS-THROUGH SECURITIES (140 = 022 thru 100 minus 110 thru 133)	140		28	0[illegible]
NONMORTGAGE LOANS				
COMMERCIAL LOANS:				
Secured (Other than Mortgage)	158			-0-
Unsecured	160			-0-
CONSUMER LOANS:				
CLOSED-END:				
Loans on Deposits	170			350
Home Improvement Loans	180			-0-
Education Loans	190			-0-
Auto Loans	200			-0-
Recall Mobile Home Loans	230			-0-
Other	210			-0-
OPEN-END:				
Revolving Loans Secured by 1-4 Dwelling Units	218			-0-
Credit Cards and Other	221			-0-
FINANCING LEASES:				
Consumer	240			-0-
Nonconsumer	250			-0-
ACCRUED INTEREST RECEIVABLE	260			18
CONTRA-ASSETS TO NONMORTGAGE LOANS:				
Loans in Process	270			-0-
Deferred Loan Fees, Unamortized Premiums, and Unaccreted Discounts	281			-0-
Valuation Allowances:				
Specific	291			-0-
General	292			-0-
NET NONMORTGAGE LOANS (300 = 150 thru 260 minus 270 thru 292)	300			368

		BIL	MIL	THOU
REPOSSESSED ASSETS				
Foreclosed Real Estate and Real Estate in Judgment	310			157
Other Repossessed Assets	320			-0-
Valuation Allowances	330			44
REAL ESTATE HELD FOR DEVELOPMENT/INVESTMENT/RESALE				
Residential Property	342			-0-
Nonresidential Property	344			-0-
Valuation Allowances	350			-0-
SERVICE CORPORATIONS/SUBSIDIARIES				
Investment	352			-0-
Unsecured Loans	354			-0-
Appraisal Increment	500			-0-
Valuation Allowances	358			-0-
CASH, DEPOSITS, AND INVESTMENT SECURITIES (NONPASS-THROUGH)				
Cash & Noninterest-Earning Deposits	360			377
U.S. Government & Agency Securities	370		1	000
Equity Securities, Except FHLB Stock	382			-0-
CMOs (Non-REMICs)	385			-0-
Securities Issued by REMICs	386			-0-
Other Investment Securities & Deposits	387		2	165
Accrued Interest Receivable	390			40
Valuation Allowances	400			-0-
FIXED ASSETS				
Office Building (Land & Improvements)	410			149
Leasehold Improvements	420			-0-
Appraisal Increment	430			-0-
Furniture, Fixtures, & Equipment	440			99
Valuation Allowances	450			-0-
OTHER ASSETS				
Financial Futures/Options: Initial Margin	460			-0-
Maintenance Margin	470			-0-
Financial Options Fees Paid	480			-0-
Deferred Net Losses (Gains) on Futures/Options Hedging Assets	510			-0-
Deferred Net Losses (Gains) on:				
Loans Sold	520			-0-
Other Assets Sold	530			-0-
Intangible Assets:				
Purchased Loan Servicing	542			-0-
Goodwill and Other	544			1757
Leased Property:				
Consumer	550			-0-
Nonconsumer	560			-0-
Accounts Receivable Secured by Pledged Deposits	570			-0-
Other Assets	580			480
Valuation Allowances	590			-0-
TOTAL ASSETS	600		34	541

(600 = 140 + 220 + 240 + 320 + 340 + 360 + 382 + 384 + 500 + 580 thru 590 + 410 thru 440 + 450 thru 470 + 510 thru 550 minus 520, 530, 542, 544, 560)

MEMO ITEMS

		BIL	MIL	THOU
Amount Eligible for Regulatory Liquidity Included on Lines A072 thru A098, and A368 thru A390	900		3	542
Troubled Debt Restructured During the Quarter	905			
Assets Acquired For Stock: Real Estate	910			
Other	920			
FHA/VA and Other Federally Insured or Guaranteed Loans Included on Lines A022 thru A050	925			
Debt Securities on Lines A385 thru A387 Rated Below Investment Grade, Plus Those Held by Service Corporations/Subsidiaries	935			
Foreign Loans and Investments Included in Section A	938			
Check This Item if the Reporting Institution Has Any Ownership Interest in a Service Corporation, Subsidiary, or Real Estate Joint Venture (Except Finance Subsidiaries)	941			

060022

FEDERAL HOME LOAN BANK BOARD
THRIFT FINANCIAL REPORT

Statement of Condition (continued)

(REPORT IN THOUSANDS OF DOLLARS)

DISTRICT/DOCKET

NAME AND ADDRESS OF INSTITUTION (Please Use Preprinted Label)

SECTION B LIABILITIES

		BIL	MIL	THOU
DEPOSITS				
With Balances Less Than $80,000	012		24	995
With Balances $80,000 to $100,000	014		4	139
With Balances Greater than $100,000:				
Negotiable Certificates (Transferable Ownership) With Original Maturities of 3 Months or Less	016			
Other - Greater than $100,000	018		1	229
BORROWINGS				
FHLBank Advances	020			
Other Borrowed Money:				
Commercial Bank Loans	030			
Reverse Repurchase Agreements	040			
Retail Repurchase Agreements	050			
Overdrafts in Transaction Accounts	060			
Commercial Paper Issued	070			
Subordinated Debentures Not Qualifying as Regulatory Capital	080			
Mortgage-Backed Bonds Issued:				
CMOs	092			
Obligations of REMICs	094			
Other	096			
Other Borrowings	100			
DISCOUNTS NET OF PREMIUMS ON DEPOSITS AND BORROWINGS	102			65
OTHER LIABILITIES				
Accrued Interest Payable	110			
Accrued Interest on Deposits	120			
Dividends Payable on Stock	130			
Accrued Taxes	140			45
Accounts Payable	150			27
Advance Payments by Borrowers for Taxes and Insurance	160			
Financial Options Fees Received	170			
Other Liabilities and Deferred Income	180			
Deferred Net Gains (Losses) on Futures/Options Hedging Liabilities	190			
Deferred Income Taxes	200			
TOTAL LIABILITIES (800 = 012 thru 200)	800		32	620

MEMO ITEM

Pledged Deposits included on Lines 0012 thru 0018	900			

SECTION C - REGULATORY CAPITAL EXCLUDING GENERAL VALUATION ALLOWANCES

		BIL	MIL	THOU
Preferred Stock:				
Perpetual	012			
Redeemable Qualifying	014			
Common Stock	020			1
Contributed Capital	030		1	974
Qualifying Mutual Capital Certificates	040			
Qualifying Subordinated Debentures	050			
Appraised Equity Capital	060			
Net Worth Certificates	070			
Accrued Net Worth Certificates	080			
Income Capital Certificates	090			
Retained Earnings	115			(142)
TOTAL REGULATORY CAPITAL EXCLUDING GENERAL VALUATION ALLOWANCES (800 = 012 THRU 115)	800		1	961
TOTAL LIABILITIES AND REGULATORY CAPITAL EXCLUDING GENERAL VALUATION ALLOWANCES (810 = 0800 + C800)	810		34	581

MEMO ITEMS

Cash Dividends on:				
Preferred Stock	900			
Common Stock	910			
Other Capital Instruments	920			

Check this item if:

1. The reporting institution is including in its balance sheet for the first time assets and liabilities acquired as a result of a merger, or
2. The reporting institution purchased or sold a branch during the quarter. 930 ☐

Check this item if Line C930 above is checked and the merger was accounted for under the purchase method of accounting. 940 ☐

If the reporting institution restated its balance sheet for the first time this quarter as a result of applying push-down accounting, enter the date of the reorganization. (State numerically; e.g., 12/01/87)

	Month	Day	Year
948			

Annual Closing Date (Show month and day numerically; e.g., December 31 should be shown as 12/31.)

	Month	Day
950	6	30

EXHIBIT 28
ALL STATE LEGAL SUPPLY CO.

FEDERAL HOME LOAN BANK BOARD
THRIFT FINANCIAL REPORT
Statement of Condition
As of December 31, 1988

Docket
11/07046

COAST SAVINGS AND LOAN
P.O. BOX 9119
VAN NUYS, CA 91409
Transmitted 01/20/89 at 18:06

(REPORT IN THOUSANDS OF DOLLARS) Prepared by: SHATHA A. ALHASHIM Phone Number (include area code): (818) 365-1900

SECTION A - ASSETS

		Bil,Mil,Thou
MORTGAGE LOANS, CONTRACTS AND PASS-THROUGH SECURITIES		
CONSTRUCTION LOANS ON:		
1-4 Dwelling Units	(022)	2,310
5 or More Dwelling Units	(024)	17,700
Nonresidential	(026)	145,430
PERMANENT MORTGAGES ON:		
1-4 Dwelling Units		
First Mortgages and Closed-End Junior Liens	(031)	4,221,560
Revolving, Open-End Loans	(033)	31,905
5 or More Dwelling Units	(034)	2,745,641
Nonresidential (Except Land)	(036)	1,700,105
Land	(050)	18,473
FACILITATING RED SALES	(060)	0
MORTGAGE-BACKED PASS-THROUGH SECURITIES:		
Insured or Guaranteed by an Agency or Instrument of the U.S.:		
Issued by REMICs	(072)	0
Issued by Other Entities	(074) ✓	1,342,280
Conventional:		
Issued by REMICs	(082)	0
Issued by Other Entities	(084) ✓	10,896
ACCRUED INTEREST RECEIVABLE	(090)	111,816
ADVANCES FOR BORROWERS' TAXES AND INSURANCE	(100)	2,043
CONTRA-ASSETS TO MORTGAGE LOANS, CONTRACTS, AND PASS-THROUGH SECURITIES:		
Loans in Process	(110)	37,516
Deferred Loan Fees, Unamortized Premiums, and Unaccreted Discounts	(121)	45,860
Valuation Allowances for Mortgages Held For Sale	(123)	0
Other Valuation Allowances		
Specific:	(132)	24,052
General:	(133)	30,107
NET MORTGAGE LOANS, CONTRACTS, AND PASS-THROUGH SECURITIES (140 = 022 thru 100 minus 110 thru 133)	(140)	10,212,524
NONMORTGAGE LOANS		
COMMERCIAL LOANS:		
Secured (Other than Mortgage)	(150)	1,729
Unsecured	(160)	1,424
CONSUMER LOANS:		
CLOSED-END:		
Loans on Deposits	(170)	20,621
Home Improvement Loans	(180)	0
Education Loans	(190)	0
Auto Loans	(200)	0
Retail Mobile Home Loans	(230)	2,074
Other	(210)	0
OPEN END		
Revolving Loans Secured by 1-4 Dwelling Units	(218)	0
Credit Cards and Other	(221)	0
FINANCING LEASES:		
Consumer	(240)	0
Nonconsumer	(250)	0
ACCRUED INTEREST RECEIVABLE	(260)	577
CONTRA-ASSETS TO NONMORTGAGE LOANS:		
Loans in Process	(270)	0
Deferred Loan Fees, Unamortized Premiums, and Unaccreted Discounts	(281)	0
Valuation Allowances:		
Specific	(291)	0
General	(292)	0
NET NONMORTGAGE LOANS (300 = 150 thru 260 minus 270 thru 292)	(300)	26,425

		Bil,Mil,Thou
REPOSSESSED ASSETS		
Foreclosed Real Estate and Real Estate in Judgment	(310)	[illegible]
Other Repossessed Assets	(320)	[illegible]
Valuation Allowances	(330)	[illegible]
REAL ESTATE HELD FOR DEVELOPMENT/INVESTMENT/RESALE		
Residential Property	(342)	0
Nonresidential Property	(344)	839
Valuation Allowances	(350)	0
SERVICE CORPORATIONS/SUBSIDIARIES		
Investment	(352)	853,673
Unsecured Loans	(354)	0
Appraisal Increments	(500)	0
Valuation Allowances	(358)	44
CASH, DEPOSITS, AND INVESTMENT SECURITIES (NONPASS-THROUGH)		
Cash & Noninterest-Earning Deposits	(360)	153,678
U.S. Government & Agency Securities	(370)	261
Equity Securities, Except FHLB Stock	(382)	13,831
CMOs (NonREMICs)	(385)	34,[illegible]
Securities Issued by REMICs	(386)	328,[illegible]
Other Investment Securities & Deposits	(387)	521,[illegible]
Accrued Interest Receivable	(390)	13,767
Valuation Allowances	(400)	5,548
FIXED ASSETS		
Office Building (Land & Improvements)	(410)	31,936
Leasehold Improvements	(420)	25,506
Appraisal Increments	(430)	0
Furniture, Fixtures & Equipment	(440)	29,660
Valuation Allowances	(450)	0
OTHER ASSETS		
Financial Futures/Options:		
Initial Margin	(460)	0
Maintenance Margin	(470)	0
Financial Options Fees Paid	(480)	0
Deferred Net Losses (Gains) on:		
Futures/Options Hedging Assets	(510)	0
Deferred Net Losses (Gains) on		
Loans Sold	(520)	0
Other Assets Sold	(530)	0
Intangible Assets:		
Purchased Loan Servicing	(542)	0
Goodwill and Other	(544)	[illegible]
Leased Property:		
Consumer	(550)	0
Nonconsumer	(560)	0
Accounts Receivable Secured by Pledged Deposits	(570)	0
Other Assets	(580)	221,019
Valuation Allowances	(590)	0
TOTAL ASSETS (800=140+300+310+320+342+344+352+354+500+360 thru 390+410 thru 440+460 thru 480+510 thru 580 Minus 330, 350, 358, 400, 450, 590)	(800)	12,898,630

MEMO ITEMS

Amount Eligible for Regulatory Liquidity Included on Lines A072 thru A090 and A360 thru A390	(900)	514,381
Troubled Debt Restructured During the Quarter	(905)	3,366
Assets Acquired For Stock:		
Real Estate	(910)	0
Other	(920)	0
FHA/VA & Other Federally Insured or Guaranteed Loans Included on Lines A022 thru A050	(935)	51,137
Debt Securities on Lines A385 thru A387 Rated Below Investment Grade, Plus Those Held by Service Corporations/Subsidiaries	(936)	179,884
Foreign Loans and Investments Included in Section A	(938)	778
Check This Item if the Reporting Institution Has Any Ownership Interest in a Service Corporation, Subsidiary, or Real Estate Joint Venture (Except Finance Subsidiaries)	(941)	X

FEDERAL HOME LOAN BANK BOARD
THRIFT FINANCIAL REPORT
Statement of Condition
As of December 31, 1988

Dr: Ltr/Docket number
11/07046

COAST SAVINGS AND LOAN
P.O. BOX 9119
VAN NUYS, CA 91409
Transmitted 01/20/89 at 18:06

(REPORT IN THOUSANDS OF DOLLARS) Prepared by: SHATHA A. ALHASHIM

Phone Number (include area code): (818) 366-2800

SECTION B
LIABILITIES

		Bil,Mil,Thou
DEPOSITS		
With Balances Less than $80,000	(012)	5,873,307
With Balances $80,000 to $100,000	(014)	1,137,717
With Balances greater than $100,000		
Negotiable Certificates (Transferable Ownership) With Original Maturities of 3 Months or Less	(016)	208,255
Other - Greater than $100,000	(018)	1,590,019
BORROWINGS		
FHLBank Advances	(020)	1,677,000
Other Borrowed Money:		
Commercial Bank Loans	(030)	0
Reverse Repurchase Agreements	(040)	518,350
Retail Repurchase Agreements	(050)	0
Overdrafts in Transaction Accounts	(060)	0
Commercial Paper Issued	(070)	0
Subordinated Debentures Not Qualifying as Regulatory Capital	(080)	0
Mortgage-Backed Bonds Issued:		
CMOs	(092)	0
Obligations of REMICs	(094)	0
Other	(096)	28,208
Other Borrowings	(100)	613,142
DISCOUNTS NET OF PREMIUMS ON DEPOSITS AND BORROWINGS	(102)	(781)
OTHER LIABILITIES		
Accrued Interest Payable	(110)	26,222
Accrued Interest on Deposits	(120)	17,994
Dividends Payable on Stock	(130)	0
Accrued Taxes	(140)	0
Accounts Payable	(150)	143,043
Advance Payments by Borrowers for Taxes and Insurance	(160)	3,903
Financial Options Fees Received	(170)	0
Other Liabilities and Deferred Income	(180)	10,851
Deferred Net Gains (Losses) on Futures/Options Hedging Liabilities	(190)	0
Deferred Income Taxes	(200)	20,418
TOTAL LIABILITIES (800 = 012 thru 200)	(800)	11,861,648

MEMO

Pledged Deposits included on Lines B012 thru B018	(900)	0

SECTION C - REGULATORY CAPITAL EXCLUDING GENERAL VALUATION ALLOWANCES

		Bil,Mil,Thou
Preferred Stock		
Perpetual	(012)	0
Redeemable Qualifying	(014)	0
Common Stock	(020)	13,110
Contributed Capital	(030)	455,777
Qualifying Mutual Capital Certificates	(040)	0
Qualifying Subordinated Debentures	(050)	251,592
Appraised Equity Capital	(060)	0
Net Worth Certificates	(070)	0
Accrued Net Worth Certificates	(080)	0
Income Capital Certificates	(090)	0
Retained Earnings	(115)	316,497
TOTAL REGULATORY CAPITAL EXCLUDING GENERAL VALUATION ALLOWANCES (800 = 012 THRU 115)	(800)	1,036,982
TOTAL LIABILITIES AND REGULATORY CAPITAL EXCLUDING GENERAL VALUATION ALLOWANCES (810 = B800 + C800)	(810)	12,898,630

MEMO ITEMS

Cash Dividends on:		
Preferred Stock	(900)	0
Common Stock	(910)	1,311
Other Capital Instruments	(920)	0
Check this Item if: 1. The reporting institution is including in its balance sheet for the first time assets and liabilities acquired as a result of a merger, or 2. The reporting institution purchased or sold a branch during this quarter	(930)	X
Check this item if line C930 above is checked AND the merger was accounted for under the purchase method of accounting	(940)	
If the reporting institution restated its balance sheet for the first time this quarter as a result of applying push-down accounting, enter the date of the reorganization. (State numerically; e.g. 12/01/87)	(948)	00/00/00
Annual Closing Date (Show month and day numerically; e.g., December 31 should be shown as 12/31.)	(950)	12/31

3/31/89

OMB NO 3060-0106
(EXPIRES 03/31/89)

FEDERAL HOME LOAN BANK BOARD
THRIFT FINANCIAL REPORT
Statement of Condition

PREPARED BY:

PHONE NUMBER (Include Area Code)

DISTRICT/DOCKET

06/08528

UNION FSB OF FRANKTON
204 SIGLER STREET
FRANKTUN IN

46044-0000

(REPORT IN THOUSANDS OF DOLARS)

SECTION A
ASSETS

		BIL	MIL	THOU
MORTGAGE LOANS, CONTRACTS AND MORTGAGE POOL SECURITIES				
CONSTRUCTION LOANS ON:				
1-4 Dwelling Units	022			449
5 or More Dwelling Units	024			-0-
Nonresidential	026			-0-
PERMANENT MORTGAGES ON:				
1-4 Dwelling Units:				
First Mortgages and Closed-End Junior Liens	031		23	282
Revolving, Open-End Loans	033			-0-
5 or More Dwelling Units	034			-0-
Nonresidential (Except Land)	036			105
Land	050			-0-
MORTGAGE POOL SECURITIES:				
Insured or Guaranteed by an Agency or Instrument of the United States	070		4	770
Privately Issued	080			-0-
ACCRUED INTEREST RECEIVABLE	090			321
ADVANCES FOR TAXES AND INSURANCE	100			-0-
CONTRA-ASSETS TO MORTGAGE LOANS, CONTRACTS, AND MORTGAGE POOL SECURITIES:				(29,533)
Loans in Process	110			161
Unamortized Yield Adjustments	121			1249
Valuation Allowances for Mortgages Held For Sale	129			-0-
Other Valuation Allowances	131			87
NET MORTGAGE LOANS, CONTRACTS, AND MORTGAGE POOL SECURITIES (140 + 022 thru 100 minus 110 thru 131)	140		28	086
NONMORTGAGE LOANS				
COMMERCIAL LOANS:				
Secured (Other than Mortgages)	150			-0-
Unsecured	160			-0-
CONSUMER LOANS:				
CLOSED-END:				
Loans on Deposits	170			288
Home Improvement Loans	180			-0-
Education Loans	190			-0-
Auto Loans	200			-0-
Retail Mobile Home Loans	230			-0-
Other	210			-0-
OPEN-END:				
Revolving Loans Secured by 1-4 Dwelling Units	218			-0-
Credit Cards and Other	221			-0-
FINANCING LEASES:				
Consumer	240			-0-
Nonconsumer	250			-0-
ACCRUED INTEREST RECEIVABLE	288			8
CONTRA-ASSETS TO NONMORTGAGE LOANS:				
Loans in Process	270			-0-
Unamortized Yield Adjustments	281			-0-
Valuation Allowances	290			-0-
NET NONMORTGAGE LOANS (300 + 150 thru 288 minus 270 thru 290)	300			296

		BIL	MIL	THOU
REPOSSESSED ASSETS AND OTHER REAL ESTATE				
Repossessed Real Estate	110			157
Other Repossessed Assets	120			-0-
Real Estate Held for Development/ Investment/Resale:				
Residential Property	142			-0-
Nonresidential Property	144			-0-
Valuation Allowances	155			44
CASH, DEPOSITS, & INVESTMENT SECURITIES				
Cash and Noninterest-Earning Deposits	160			79
U S Government and Agency Securities	170			1000
Equity Securities, Except FHLB Stock	182			-0-
Mortgage Derivatives:				
CMOs	185			-0-
Principal-Only (PO) Strips	188			-0-
Interest-Only (IO) Strips and Residuals	189			-0-
Other Investment Securities & Deposits	191		1	699
Accrued Interest Receivable	190			71
Valuation Allowances	400			-0-
SERVICE CORPORATIONS/SUBSIDIARIES				
Equity Investment	406			-0-
Unsecured Loans	408			-0-
Valuation Allowances	409			-0-
FIXED ASSETS, Net of Depreciation				
Office Buildings and Land	410			47
Leasehold Improvements	420			-0-
Furniture, Fixtures, and Equipment	440			90
OTHER ASSETS				
Financial Futures/Options:				
Initial Margin	460			-0-
Maintenance Margin	470			-0-
Financial Options Fees Paid	480			-0-
Deferred Net Losses (Gains) on Futures/Options Hedging Assets	510			-0-
Deferrals Pursuant to §63c.14	525			-0-
Intangible Assets:				
Purchased Loan Servicing	562			-0-
Goodwill and Other	566			767
Leased Property:				
Consumer	550			-0-
Nonconsumer	560			-0-
Excess Loan Servicing	578			-0-
Other Assets	580			344
Valuation Allowances	590			-0-
TOTAL ASSETS (600 + 140 + 300 + 210 thru 344 + 388 thru 391 + 398 + 406 + 408 + 416 thru 568 minus 395, 400, 409, 590)	800		30	[illegible]R

MEMO ITEMS

Amount Eligible for Regulatory Liquidity	900			1889
Assets Acquired For Stock:				
Real Estate	910			
Other	920			
FHA/VA and Other Federally Insured or Guaranteed Loans Included on Lines A022 thru A050	935			
Debt Securities Rated Below Investment Grade, Plus Those Held by Service Corporations/Subsidiaries	937			
Foreign Loans and Investments Included in Section A	938			

Check This Item if the Reporting Institution Has Any Ownership Interest in a Service Corporation, Subsidiary, or Real Estate Joint Venture (Except Finance Subsidiary)

MEMO ITEMS

Troubled Debt Restructured:				
During the Quarter	905			
Cumulative Outstanding Balance	906			
Facilitated Sales of Real Estate	907			357
Securities Reported in Section A Issued by REMICs	908			

FEDERAL HOME LOAN BANK BOARD
THRIFT FINANCIAL REPORT

Statement of Condition (continued)

(REPORT IN THOUSANDS OF DOLLARS)

DISTRICT/DOCKET

NAME AND ADDRESS OF INSTITUTION (Please Use Preprinted Label)

06/08528

UNION FSB OF FRANKTON
204 SIGLER STREET
FRANKTON IN

46044-0000

SECTION B LIABILITIES

		BIL	MIL	THOU
DEPOSITS				
With Balances Less Than $80,000	012		25	458
With Balances $80,000 to $100,000	014		3	624
With Balances Greater than $100,000:				
Negotiable Certificates (Transferable Ownership)				
With Original Maturities of				
3 Months or Less	016			
Other - Greater Than $100,000	018		1	936
BORROWINGS				
FHLBank Advances	020			
Other Borrowed Money:				
Commercial Bank Loans	030			
Reverse Repurchase Agreements	040			
Retail Repurchase Agreements	050			
Overdrafts in Transaction Accounts	060			0
Commercial Paper Issued	070			
Subordinated Debentures (Incl. Mandatory Convertible) Not Qualifying as Definitional Capital	080			
Mortgage-Backed Securities Issued:				
CMOs	092			
Other	096			
Other Borrowings	100			
UNAMORTIZED YIELD ADJUSTMENTS ON PURCHASED DEPOSITS AND BORROWINGS	102			59
OTHER LIABILITIES				
Accrued Interest Payable	110			
Accrued Interest on Deposits	120			425
Dividends Payable on Stock	130			
Accrued Taxes	140			19
Accounts Payable	150			44
Advance Payments by Borrowers for Taxes and Insurance	160			
Financial Options Fees Received	170			
Other Liabilities and Deferred Income	180			
Deferred Net Gains (Losses) on Futures/Options Hedging Liabilities	190			
Deferred Income Taxes	200			
LIABILITIES EXCLUDING DEFINITIONAL CAPITAL (800 = 012 thru 200)	800		31	585
DEFINITIONAL CAPITAL				
Qualifying Subordinated Debentures	310			
Qualifying Mandatory Convertible Subordinated Debentures	312			
Qualifying Mutual Capital Certificates	320			
Qualifying Redeemable Preferred Stock	330			
Net Worth Certificates	340			
Income Capital Certificates	350			
Accumulated Annual Income Payments, not Due and Payable	360			
TOTAL DEFINITIONAL CAPITAL (300 = 310 thru 360)	380			
FSLIC Notes on Definitional Capital Instruments	390			
TOTAL LIABILITIES (INCL. DEFINITIONAL CAPITAL) (400 = 800 + 300 - 390)	400		31	585

SECTION C MODIFIED EQUITY CAPITAL

		BIL	MIL	THOU
Perpetual Preferred Stock	012			
Common Stock:				
Par Value	020			1
Paid in Excess of Par	030			799
Retained Earnings	115			83
TOTAL MODIFIED EQUITY CAPITAL (801 = 012 thru 115)	801		1	083
TOTAL LIABILITIES AND MODIFIED EQUITY CAPITAL (810 = 400 + C801)	810		32	668

MEMO ITEMS

CALCULATION OF REGULATORY CAPITAL:				
Modified Equity Capital (C801)	952		1	083
Adjustments to Modified Equity Capital for Institutions Reporting on a GAAP Basis	954			
Definitional Capital (B380)	956			
Qualifying Pledged Deposits	958			
General Valuation Allowances (K360)	960			80
Risk Analysis Reporting (RAR) Items:				
Approved Equity Capital	962			
RAR/GAAP Differences:				
Sales of Real Estate	966			
Futures Transactions	968			
Accretion/Amortization of Discounts/Premiums	970			
Loan Origination and Commitment Fees	976			
Accounting Forbearances:				
FSLIC Capital Contributions	978			954
Amortization of:				
Goodwill	982			
Premiums and Discounts	984			
Other Accounting Forbearances	986			
TOTAL REGULATORY CAPITAL (950 = 952 thru 986)	990		2	117
Losses Unrecognized Pursuant to 561.13(a)(3)	992			

Check this item if:

1. The reporting institution is including in its balance sheet for the first time assets and liabilities acquired as a result of a merger, or
2. The reporting institution purchased or sold a branch during the quarter. 930 ☐

Check this item if Line C930 above is checked and the merger was accounted for under the purchase method of accounting 940 ☐

If the reporting institution restated its balance sheet for the first time this quarter as a result of applying push-down accounting, enter the date of the reorganization. (State numerically)

	Month	Day	Year
948			

Annual Closing Date (Show month and day numerically; e.g., December 31 should be shown as 12/31.)

	Month	Day
950	6	30

501

FEDERAL HOME LOAN BANK BOARD
THRIFT FINANCIAL REPORT
Statement of Condition
As of March 31, 1989

District/Docket Number
11/07046

COAST SAVINGS AND LOAN
P.O. BOX 9119
VAN NUYS, CA 91409
Transmitted 04/20/89 at

CAPTION A
29
ALL-STATE LEGAL SUPPLY CO

(REPORT IN THOUSANDS OF DOLLARS)

Prepared by: PAULINE CRANE Tel: (818) 366-2500

SECTION A - ASSETS

		Bil,Mil,Thou
MORTGAGE LOANS, CONTRACTS AND MORTGAGE POOL SECURITIES		
CONSTRUCTION LOANS ON:		
1-4 Dwelling Units	(022)	2,310
5 or More Dwelling Units	(024)	17,700
Nonresidential	(026)	128,759
PERMANENT MORTGAGES ON:		
1-4 Dwelling Units:		
First Mortgages and Closed-End Junior Liens	(031)	4,546,493
Revolving, Open-End Loans	(033)	32,663
5 or More Dwelling Units	(034)	2,815,308
Nonresidential (Except Land)	(036)	1,649,601
Land	(050)	17,355
MORTGAGE POOL SECURITIES:		
Insured or Guaranteed by an Agency or Instrument of the United States	(070)	1,314,709
Privately Issued	(080)	10,797
ACCRUED INTEREST RECEIVABLE	(090)	122,354
ADVANCES FOR TAXES AND INSURANCE	(100)	3,025
CONTRA-ASSETS TO MORTGAGE LOANS, CONTRACTS, AND MORTGAGE POOL SECURITIES:		
Loans in Process	(110)	26,247
Unamortized Yield Adjustments	(121)	39,972
Valuation Allowances for Mortgages Held For Sale	(129)	0
Other Valuation Allowances	(131)	60,615
NET MORTGAGE LOANS, CONTRACTS, AND MORTGAGE POOL SECURITIES (140 = 022 thru 100 minus 110 thru 131)	(140)	10,534,240
NONMORTGAGE LOANS		
COMMERCIAL LOANS:		
Secured (Other than Mortgage)	(150)	1,618
Unsecured	(160)	1,424
CONSUMER LOANS:		
CLOSED-END:		
Loans on Deposits	(170)	23,108
Home Improvement Loans	(180)	0
Education Loans	(190)	0
Auto Loans	(200)	0
Retail Mobile Home Loans	(230)	1,941
Other	(210)	0
OPEN END:		
Revolving Loans Secured by 1-4 Dwelling Units	(218)	0
Credit Cards and Other	(221)	0
FINANCING LEASES:		
Consumer	(240)	0
Nonconsumer	(250)	0
ACCRUED INTEREST RECEIVABLE	(260)	606
CONTRA-ASSETS TO NONMORTGAGE LOANS:		
Loans in Process	(270)	0
Unamortized Yield Adjustments	(281)	0
Valuation Allowances	(290)	0
NET NONMORTGAGE LOANS (300 = 150 thru 260 minus 270 thru 290)	(300)	28,697
MEMO ITEMS		
Troubled Debt Restructured:		
During the Quarter	(905)	0
Cumulative Outstanding Balance	(906)	78,357
acilitated Sales of Real Estate	(907)	23,312
Securities Reported in Section A issued by REMICs	(908)	310,093

		Bil,Mil,Thou
REPOSSESSED ASSETS AND OTHER REAL ESTATE		
Repossessed Real Estate	(310)	25,371
Other Repossessed Assets	(320)	0
Real Estate Held for Development/ Investment/Resale:		
Residential Property	(342)	0
Nonresidential Property	(344)	3,382
Valuation Allowances	(355)	778
CASH, DEPOSITS, & INVESTMENT SECURITIES		
Cash and Noninterest-Earning Deposits	(360)	121,849
U.S. Government and Agency Securities	(370)	0
Equity Securities, Except FHLB Stock	(382)	8,004
Mortgage Derivatives:		
CMOs	(385)	297,458
Principal-Only (PO) Strips	(388)	19,215
Interest-Only (IO) Strips and Residuals	(389)	26,710
Other Investment Securities & Deposits	(391)	655,558
Accrued Interest Receivable	(390)	10,769
Valuation Allowances	(400)	10,418
SERVICE CORPORATIONS, SUBSIDIARIES		
Equity Investment	(406)	641,450
Unsecured Loans	(408)	0
Valuation Allowances	(409)	44
FIXED ASSETS, Net of Depreciation		
Office Buildings and Land	(410)	32,410
Leasehold Improvements	(420)	34,020
Furniture, Fixtures, and Equipment	(440)	33,781
OTHER ASSETS		
Financial Futures/Options:		
Initial Margin	(460)	0
Maintenance Margin	(470)	0
Financial Options Fees Paid	(480)	0
Deferred Net Losses (Gains) on Futures/Options Hedging Assets	(510)	0
Deferrals Pursuant to SFAS 14	(525)	0
Intangible Assets:		
Purchased Loan Servicing	(542)	0
Goodwill and Other	(544)	232,075
Leased Property:		
Consumer	(550)	0
Nonconsumer	(560)	0
Excess Loan Servicing	(578)	0
Other Assets	(580)	235,319
Valuation Allowances	(590)	0
TOTAL ASSETS (800=140+300+310 thru 344+360 thru 390+406+408+410 thru 580 minus 355, 400, 409, 590)	(800)	12,930,074
MEMO ITEMS		
Amount Eligible for Regulatory Liquidity	(900)	533,918
Assets Acquired For Stock:		
Real Estate	(910)	0
Other	(920)	0
FHA/VA & Other Federally Insured or Guaranteed Loans Included on Lines A022 thru A050	(935)	59,047
Debt Securities Rated Below Investment Grade, Plus Those Held by Service Corporations/Subsidiaries	(936)	149,591
Foreign Loans and Investments Included in Section A	(938)	758
Check This Item if the Reporting Institution Has Any Ownership interest in a Service Corporation, Subsidiary, or Real Estate Joint Venture (Except Finance Subsids.)	(941)	X

503

000028

FEDERAL HOME LOAN BANK BOARD
THRIFT FINANCIAL REPORT
Statement of Condition
As of March 31, 1989

District/Docket Number
11/07046

COAST SAVINGS AND LOAN
P.O. BOX 9119
VAN NUYS, CA 91409
Transmitted 04/20/89 at 14:33

(REPORT IN THOUSANDS OF DOLLARS)

Prepared by: PAULINE CRANE Tel: (818) 366-2800

SECTION B
LIABILITIES

		Bil,Mil,Thou
DEPOSITS		
With Balances Less than $80,000	(012)	6,040,955
With Balances $80,000 to $100,000	(014)	1,112,441
With Balances greater than $100,000:		
Negotiable Certificates (Transferable Ownership) With Original Maturities of 3 Months or Less	(016)	359,910
Other - Greater than $100,000	(018)	1,546,706
BORROWINGS		
FHLBank Advances	(020)	1,795,250
Other Borrowed Money:		
Commercial Bank Loans	(030)	0
Reverse Repurchase Agreements	(040)	517,878
Retail Repurchase Agreements	(050)	0
Overdrafts in Transaction Accounts	(060)	33,339
Commercial Paper Issued	(070)	0
Subordinated Debentures (Incl. Mandatory Convertible) Not Qualifying as Definitional Capital	(080)	0
Mortgage-Backed Securities Issued:		
CMOs	(092)	0
Other	(096)	28,208
Other Borrowings	(100)	590,453
UNAMORTIZED YIELD ADJUSTMENTS ON PURCHASED DEPOSITS AND BORROWINGS	(102)	(651)
OTHER LIABILITIES		
Accrued Interest Payable	(110)	19,723
Accrued Interest on Deposits	(120)	21,400
Dividends Payable on Stock	(130)	0
Accrued Taxes	(140)	0
Accounts Payable	(150)	94,913
Advance Payments by Borrowers for Taxes and Insurance	(160)	3,061
Financial Options Fees Received	(170)	0
Other Liabilities and Deferred Income	(180)	12,695
Deferred Net Gains (Losses) on Futures/Options Hedging Liabilities	(190)	0
Deferred Income Taxes	(200)	43,430
LIABILITIES EXCLUDING DEFINITIONAL CAPITAL (800 = 012 thru 200)	(800)	12,219,711
DEFINITIONAL CAPITAL		
Qualifying Subordinated Debentures	(310)	251,598
Qualifying Mandatory Convertible Subordinated Debentures	(312)	0
Qualifying Mutual Capital Certificates	(320)	0
Qualifying Redeemable Preferred Stock	(330)	0
Net Worth Certificates	(340)	0
Income Capital Certificates	(350)	0
Accumulated Annual Income Payments, not Due and Payable	(360)	0
TOTAL DEFINITIONAL CAPITAL (380 = 310 thru 360)	(380)	251,598
FSLIC Notes on Definitional Capital Instruments	(390)	0
TOTAL LIABILITIES (INCL. DEFINITIONAL CAPITAL) (400 = 800 + 380 - 390)	(400)	12,471,309

SECTION C
MODIFIED EQUITY CAPITAL

		Bil,Mil,Thou
Perpetual Preferred Stock	(012)	0
Common Stock:		
Par Value	(020)	13,110
Paid in Excess of Par	(030)	155,894
Retained Earnings	(115)	289,761
TOTAL MODIFIED EQUITY CAPITAL (801 = 012 thru 115)	(801)	458,765
TOTAL LIABILITIES AND MODIFIED EQUITY CAPITAL: (810 = B400 + C801)	(810)	12,930,074

MEMO ITEMS

CALCULATION OF REGULATORY CAPITAL		
Modified Equity Capital (C801)	(952)	458,765
Adjustments to Modified Equity Capital for Institutions Reporting on a GAAP Basis	(954)	0
Definitional Capital (B380)	(956)	251,598
Qualifying Pledged Deposits	(958)	0
General Valuation Allowances (K360)	(960)	0
Risk Analysis Reporting (RAR) Items:		
Appraised Equity Capital	(962)	0
RAP/GAAP Differences:		
Sales of Real Estate	(966)	0
Futures Transactions	(968)	0
Accretion/Amortization of Discounts/Premiums	(970)	0
Loan Origination and Commitment Fees	(976)	0
Accounting Forbearances:		
FSLIC Capital Contributions	(978)	595,863
Amortization of:		
Goodwill	(982)	0
Premiums and Discounts	(984)	0
Other Accounting Forbearances	(986)	0
TOTAL REGULATORY CAPITAL (990=952 thru 986)	(990)	1,010,246
Losses Unrecognized Pursuant to 561.12(a)(3)	(992)	0

Check this Item if: 1. The reporting institution is including in its balance sheet for the first time assets and liabilities acquired as a result of a merger, or 2. The reporting institution purchased or sold a branch during the quarter	(930)	X
Check this item if line C930 above is checked AND the merger was accounted for under the purchase method of accounting	(940)	0
If the reporting institution restated its balance sheet for the first time this quarter as a result of applying push-down accounting, enter the date of the reorganization (State numerically)	(948)	0
Annual Closing Date (Show month and day numerically; e.g., December 31 should be shown as 12/31.)	(950)	12/31

505

000029

Comptroller General
of the United States

Washington, D.C. 20648

B-240860

August 27, 1990

The Honorable Terry Sanford
Committee on Banking, Housing
and Urban Affairs
United States Senate

Dear Senator Sanford:

During the Committee's hearing of August 1 on bank and thrift fraud, you requested our opinion concerning actions the government may take to undo or restructure agreements that the Federal Savings and Loan Insurance Corporation (FSLIC) made in 1988 in order to facilitate the acquisition of troubled thrifts. You asked about the government's recourse with respect to the agreements should evidence of improper conduct by government offiicals be uncovered, and also about measures the government could take if it were to be determined that financial assistance commitments made by FSLIC were overly generous.

As explained in the enclosed analysis, provisions of FSLIC's assistance agreements permit termination of the government's obligations only in specified circumstances, including the acquirer's insolvency or failure on the part of the acquirer to comply with material terms of the agreement. However, apart from any rights afforded to the govenment under FSLIC's

agreements, well-established legal principles would permit the government to cancel any of the agreements and discontinue financial commitments thereunder on the basis of fraud or misdealing in particular transactions.

In the absence of misconduct, or circumstances which under the agreements would justify termination, the government would not be able to cancel FSLIC's agreements without exposure to potentially enormous financial liability. In making the agreements, FSLIC acted under broad statutory authority to set the terms and conditions of the assistance it would give to the acquirers of troubled thrifts. Any attempt by the government to cancel the agreements based on cost considerations or imprudent government bargaining could amount to a breach of contract and also could be challenged as an unconstitutional taking of property without just compensation.

Agreements made by FSLIC do include measures the government could use to renegotiate or restructure the terms of its financial commitments and reduce future obligations. For example, the government could prepay promissory notes FSLIC gave to the acquirers, saving future interest expenses. The government also may be able to buy back assets for which FSLIC guaranteed a particular return or yield. However, whether any of these options would make sense financially depends on the facts of the particular transaction.

Under the Financial Institution Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Public Law 101-73, the Resolution Trust Corporation is charged with reviewing FSLIC's agreements in order to identify cost saving options that the government may

exercise under those agreements. We understand that the Corporation is actively conducting the review called for by FIRREA, and that it expects to report the results of its review in the near future.

We trust that this responds to your questions. By separate correspondence of today, we are providing copies of this response to Chairman Riegle and Senator Garn.

Sincerely yours,

/s/
Acting Comptroller General
of the United States

Enclosure

ANALYSIS OF THE GOVERNMENT'S LEGAL OPTIONS WITH RESPECT TO FSLIC AGREEMENTS

BACKGROUND

During 1988, the Federal Savings and Loan Insurance Corporation (FSLIC) with the approval of the Federal Home Loan Bank Board resolved approximately 220 failed savings and loan institutions. Of this total, 179 thrifts were sold to acquirers in 86 transactions.[1] In general, these transactions involved several types of agreements, including: (1) one or more "acquisition agreements," under which a troubled thrift's assets and liabilities were transferred to the acquirer; and (2) an "assistance agreement," under which FSLIC agreed to make certain contributions to the acquirer and to compensate it for future losses. The assistance FSLIC agreed to provide was generally in the form of promissory notes and guarantees rather than cash.

The terms of the acquisitions and the forms and amount of assistance FSLIC agreed to provide in the transactions we reviewed varied according to the particular transaction.[2] Typically, FSLIC provided

[1] *See Failed Thrifts: GAO's Analysis of Bank Board 1988 Deals* (GAO/T-GGD-89-11, Mar. 14, 1989).

[2] For a discussion of 15 assisted transactions in Texas, see *Failed Thrifts: Bank Board's 1988 Texas Resolutions* (GAO/GGD-89-59, Mar. 11, 1989). *See also* B-233063, Oct. 11, 1988, generally discussing FSLIC's use of promissory notes and assistance guarantees.

the thrift acquirer with a promissory note for the negative tangible net worth of the troubled thrift. Also, FSLIC's assistance agreements provided for guarantees covering net capital losses due to write-downs or sales of problem assets, yield subsidies on nonperforming assets to ensure a specifiic rate of return, and indemnification against undisclosed liabilities of or litigation against the acquired thrift.

Acquirers generally received some other benefits in addition to FSLIC assistance. In many cases, the Bank Board granted acquirers "forbearances" from supervisory or enforcement action based on the acquired thrift's failure to meet particular regulatory requirements. Following the passage of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Public Law 101-73, 103 Stat. 183, the status of some forbearances, particularly those relating to capital standards and the accounting treatment of supervisory goodwill, have been called into question.[3] Also, acquirers of troubled thrifts received several tax advantages, including the ability to exclude financial assistance from income and to carry over losses on the books of the acquired thrift.[4]

[3] On January 9, 1990, the Office of Thrift Supervision (OTS) issued a bulletin advising thrifts that FIRREA eliminated capital and accounting forbearances previously granted by the Bank Board. A number of thrift acquirers have filed lawsuits challenging the position taken by OTS, and several interim court rulings have been favorable to the acquirers. *See, e.g., Winstar Corp. v. United States*, No. 90-8C, slip op. (C1. Ct. July 27, 1990); *Far West Federal Bank v. Director, Office of Thrift Supervision*, No. 9C-103-PA, slip ops. (D. Or. May 4 and June 8, 1990).

[4] The Technical and Miscellaneous Revenue Act of 1988, enacted on Novmeber 10, 1988, reduced the tax benefits available to thrift acquirers. FIRREA repealed the special tax rules applicable to assisted acquisitions. FIRREA section 1401.

While tax benefits accrued to the acquirer, FSLIC's assistance agreements included provisions for allocating the value of these benefits between the acquirer and FSLIC.

Acquirers agreed to assume the troubled thrift's assets and liabilities and invest new capital in the thrift. With respect to assets covered by guarantees, acquirers agreed to use their best efforts in managing and disposing of the assets so as to maximize gains and minimize losses, and also to share gains on asset sales with FSLIC. FSLIC also executed "warrant agreements" with acquirers entitling it to purchase common stock in the acquired thrift.

ANALYSIS

At the outset, there is nothing in the statutes underlying the assistance agreements made by FSLIC or the changes recently effected by FIRREA that would permit wholesale cancellation of the government's obligations under the agreements. FSLIC had very broad authority to provide financial assistance to acquirers of troubled thrifts and to set the terms of such assistance under provisions of title IV of the National Housing Act, then codified at 12 U.S.C. §§ 1725, 1728, and 1729 (1982). Under section 402(d) of the Act, FSLIC was empowered to issue notes and other obligations "upon such terms and conditions as (the Bank Board) may determine." Section 406(f) of the Act allowed FSLIC, in its sole discretion, to make contributions to troubled thrifts and provide them with other forms of assistance. Under section 406(f)(2), FSLIC was authorized, in its sole discretion and under the terms and conditions it prescribed, to guarantee an institution against losses arising from its acquisition of a troubled thrift. Based

on these statutory provisions, we held in B-233063, Oct. 11, 1988, that FSLIC had the requisite authority to issue promissory notes and guarantees as part of its assisted acquisitions. In that opinion, we also held that FSLIC notes and guarantees are obligations of the United States, backed by its full faith and credit.

With the passage of FIRREA, the Federal Deposition Insurance Corporation became responsible for administering FSLIC's assistance agreements and satisfying FSLIC's debts and liabilities from the newly established FSLIC Resolution Fund. FIRREA section 215. The Act explicitly preserved the rights, duties, and obligations of FSLIC and other persons arising under "any section of title IV of the National Housing Act," which, as discussed above, authorized FSLIC's assistance agreements. FIRREA section 401(f). While the Resolution Trust Corporation (RTC) was charged with reexamining FSLIC's agreements for purposes of identifying cost saving measures and exercising options for reducing costs, the specified options do not include cancellation of the agreements.[5]

The terms of assistance agreements we reviewed allow the government to terminate obligations under the agreements only in specified circumstances, including the acquirer's insolvency or failure on the

[5] Under section 21A(b)(11)(B) of the Federal Home Loan Bank Act, added by section 501(a) of FIRREA, RTC is required to exercise "any and all legal rights to modify, renegotiate, or restructure [FSLIC's] agreements where savings would be realized by such actions." The conference report's explanation of this provision makes clear that the rights RTC may exercise are those that would have been available to FSLIC under the agreements. H.R. Rep. No. 209, 101st Cong., 1st Sess. 414 (1989).

part of the acquirer to comply with material terms of the agreement. Assistance agreements may include a provision terminating the agreement as a whole if both parties have agreed to do so. Additionally, FSLIC and the acquirer may vary specific aspects of assistance agreements upon reopening negotiations of the parties. In certain circumstances, discussed below, FSLIC may vary the terms of its assistance obligations by unilateral action.

Of course, apart from any rights afforded to the government under the terms of FSLIC's assistance agreements, the government would be able to cancel any agreement and discontinue its financial commitments thereunder if evidence of fraud or misdealing with respect to the agreement was uncovered. The courts have held that any government contract tainted by fraud or misdealing may be canceled by the government and, depending on the facts of the case, the government may be able not only to disengage itself from future financial commitments but also to recover any payments previously made. *See J.E.T.S. v. United States*, 838 F.2d 1196 (Fed. Cir. 1988); *K & R Engineering Co. v. United States*, 616 F.2d 469 (Ct. Cl. 1980). The courts have also held that the government may cancel any contract in which a government official had a conflict of interest, even if the party contracting with the government was not guilty of wrongdoing. *United States v. Mississippi Valley Generating Company*, 364 U.S. 520 (1961). *See also K & R Engineering Co.*, cited above. Additionally, other types of illegality in the making or performance of a government contract will provide a basis for cancellation by the government. *See, e.g., Alabama Rural Fire Ins. Co. v. United States*, 572 F.2d 727 (Ct. Cl. 1978).

In the absence of fraud or misdealing, or circumstances justifying termination under the provisions of FSLIC's agreements, the government could cancel the agreements only with exposure to potentially enormous financial liability. The Supreme Court has held that, when the government enters into a contract, it ordinarily incurs responsibilities similar to those of a private person who is a partly to the contract. *Lynch v. United States*, 292 U.S. 571 (1934); *Perry v. United States*, 294 U.S. 330 (1935). Thus, if the government terminates a contract without justification, such termination is a breach of contract and the government becomes liable for all damages resulting from the breach. *United States v. Behan*, 110 U.S. 338 (1884); *United States v. Spearin*, 248 U.S. 132 (1918).

Furthermore, although Congress could enact legislation cancelling the assistance agreements, the enactment of any such legislation could be subject to challenge on constitutional grounds. The courts have held that contractual rights against the government are Fifth Amendment property interests that cannot be taken without just compensation and, therefore, that congressional power to abrogate government contracts is narrowly circumscribed. *Lynch v. United States*, 292 U.S. 571 (1934); *Perry v. United States*, 294 U.S. 330 (1935); *Larionoff v. United States*, 533 F.2d 1167 (D.C. Cir. 1976). The courts have also stated that although Congress may constitutionally impair existing contract rights in the exercise of a paramount government power such as the "war power," Congress does not have the power to repudiate the government's contractual obligations solely in order to save money. *Lynch*, cited above, 292 U.S. at 580; *Larionoff*, cited above, 533 F.2d at 1179-80.

As we indicated above, there are measures the government can take short of cancelling FSLIC's assistance agreements in their entirety in order to reduce the government's future expenses. For example, provisions in many agreements allow the government to purchase or require the sale of assets for which assistance has been guaranteed, thus eliminating the need for future yield maintenance payments and capital loss coverage. Also, the terms of FSLIC's negative net worth notes may provide for early payment on the notes, saving the government future interest expenses.

Whether the government's use of options mentioned above makes sense financially depends upon the facts of each transaction. As discussed previously, FIRREA requires the RTC to review FSLIC's agreements in order to identify and exercise cost-saving options available under those agreements. We understand that the RTC is actively conducting the review called for by FIRREA, and that it expects to report the results of its review in the near future.

IN THE UNITED STATES CLAIMS COURT

No. 90-CV-773C
Chief Judge Loren Smith

STATESMAN SAVINGS HOLDING CORP.
405 Sixth Avenue
Des Moines, Iowa 50309,

and

THE STATESMAN GROUP, INC.
405 Sixth Avenue
Des Moines, Iowa, 50309,

and

AMERICAN LIFE AND CASUALTY INSURANCE COMPANY
601 Locust Street
Two Ruan Center, Suite 1400
Des Moines, Iowa 50309,
Plaintiffs,

v.

UNITED STATES OF AMERICA
Defendant.

AFFIDAVIT OF D.J. NOBLE IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO LIABILITY

D.J. Noble, being duly sworn, upon his oath deposes and says:

1. I am D.J. Noble, Chairman of the Boards of The Statesman Group, Inc. ("Statesman Group"), American Life and Casualty Insurance Company ("American Life"), Statesman Savings Holding Corp. ("SSHC") and Statesman Bank for Savings, FSB ("Statesman Bank").

2. I submit this Affidavit in support of the Plaintiffs' Motion for Summary Judgment as to Liability. I am familiar with the matters set forth herein from my own personal knowledge and from a review of materials in the files and possession of Statesman Group.

3. Statesman Bank was chartered by the Federal Savings and Loan Insurance Corporation ("FSLIC") on March 11, 1988 for the purpose of acquiring four insolvent savings associations. Statesman Bank acquired by merger First Federal Savings Bank, of Waterloo, Iowa ("First Federal"), Peoples Federal Savings and Loan Association, of Waterloo, Iowa ("Peoples"), and The Perpetual Savings and Loan Association, of Waterloo, Iowa ("Perpetual") (collectively, the "Waterloo Institutions"), and by a pass-through receivership, Statesman Bank also acquired First Federated Savings Bank, of West Palm Beach, Florida ("Federated").

4. SSHC was organized by Statesman Group and American Life under the laws of Iowa for the purpose of becoming the direct holding company of Statesman Bank. SSHC owns one hundred percent (100%) of the

issued and outstanding common stock of Statesman Bank, is entitled to receive all dividends declared by Statesman Bank, and has the right to receive the net assets of Statesman Bank upon the liquidation, dissolution or winding up of the affairs of Statesman Bank. American Life, a corporation organized under the laws of Iowa, owns all of the outstanding common stock of SSHC. Statesman Group, a publicly-owned corporation organized under the laws of Delaware, owns all of the outstanding preferred stock of SSHC and indirectly owns all of the outstanding common and preferred stock of American Life.

5. In 1987, Statesman Group became aware of the existence and availability of Federated Financial Corporation, a mortgage banking company located in Atlanta, Georgia. At that time, Statesman Group owned controlling interest in Statesman Mortgage Company, a mortgage banking company which was engaged in the servicing of single-family real estate loans. It was our objective to acquire by merger or acquisition another mortgage servicing company in order to increase the size of Statesman Mortgage Company's mortgage servicing portfolio. Federated Financial Corporation, a subsidiary of Federated, was insolvent at that time. Under my direction, Statesman Group made inquiry to the FHLBB in Atlanta, Georgia regarding the possibility of acquiring Federated Financial Corporation with governmental assistance. We were advised that neither FSLIC nor FHLBB could grant financial assistance to aid such an acquisition because Federated Financial Corporation was not an insured depository institution, even though it was a subsidiary of such an institution. We were ultimately directed to government personnel in Washington, D.C. to further discuss the possibility of such an acquisition. This then led to discussions with

representatives of FSLIC, which were the beginning of the discussions and negotiations which ultimately led to the acquisition of the four insolvent thrifts.

6. In preliminary discussions, FSLIC confirmed that although federal laws would not allow FSLIC to grant assistance to acquire the insolvent subsidiary of Federated, it could assist in the acquisition of Federated itself, which would then include its mortgage banking subsidiary. FSLIC further advised that because Statesman Group owned an investment banking company, R.G. Dickinson & Co. (a regional stock brokerage firm), the then-existing regulations would only permit an acquisition of an insolvent thrift by a company affiliated with an investment banking company if the thrift's assets exceeded $500 million. FSLIC suggested that it could combine Federated with other thrifts to reach the $500 million threshold. I stated that Statesman Group was interested in owning a thrift, but only if it could have its home office in Des Moines, Iowa. Accordingly, FSLIC "packaged" Federated with the Waterloo Institutions which, when combined with Federated, exceeded the $500 million threshold. FSLIC then publicized the package it had designed for Statesman Group and requested bids from other entities.

7. On January 8, 1988, Statesman Group submitted a proposal (the "Proposal") to acquire the four institutions. The Proposal called for the formation and capitalization of SSHC and Statesman Bank. SSHC was to infuse $21 million of capital into Statesman Bank, sixty percent (60%) in the form of Statesman Group preferred stock from Statesman Group and forty percent (40%) in the form of cash from American Life. Statesman Bank was to be organized and chartered by FSLIC, and then turned over as a "turnkey" operation to SSHC to be a wholly-owned

subsidiary of SSHC. The Proposal called for assistance from FSLIC in the form of cash and a Promissory Note in the total amount equal to the combined negative regulatory capital of the four thrifts. FSLIC was also to guarantee partial reimbursement of losses on certain Covered Assets, to provide payment for spread and yield maintenance on certain Covered Assets, and to provide indemnification against certain losses. P1. Exh. 1 is a true copy of Statesman Group's Proposal and business plan (the "Business Plan") which was incorporated by reference.

8. Under the Proposal, $21 million of the FSLIC cash contribution was to be a "capital credit" and would thus become a permanent part of Statesman Bank's regulatory capital and not subject to reduction through amortization. The pro forma financial statement schedules incorporated in the Business Plan specifically treated this $21 million as permanent capital, not subject to amortization.

9. The Proposal and Business Plan specified that the purchase method of accounting, which was required by FSLIC, was critical to the proposed acquisition. Under the purchase method of accounting, the book value of the assets and liabilities of an acquired institution is adjusted ("marked to market") to fair market value at the time of the acquisition, and any excess in the cost of the acquisition (including any liabilities assumed by the acquirer) over the fair market value of the acquired assets is separately recorded on the acquirer institution's books as "goodwill"—an intangible, non-earning asset subject to amortization. Goodwill recorded in connection with a supervisory merger is known as "supervisory goodwill." The Business Plan expressly contemplated that Statesman Bank would record as an

asset "[g]oodwill of approximately $25.8 million arising from the acquisition...."

10. Both the regulatory capital credit and the goodwill were critical to the transaction because they ensured that Statesman Bank would meet the prevailing regulatory capital standards after the transaction. Consistent with the conservative management style applied to the other entities it owns, Statesman Group negotiated the acquisition of the four institutions only on the basis that Statesman Bank would be in an economically-viable financial condition after the acquisition. Simply stated, Statesman Group insisted that the regulatory capital of Statesman Bank be at least twice the regulatory amount required as of the date of acquisition. We anticipated that the then-existing requirement that a thrift have regulatory capital equal to three percent (3%) of its assets would be increased to six percent (6%) of its assets, and it was an essential part of the bargain that Statesman Bank meet the six percent (6%) test at the date of acquisition.

11. The use of the capital credit for $21 million of the FSLIC cash contribution and the purchase method of accounting, including the treatment of the supervisory goodwill as an asset under regulatory accounting principles, were integral to Statesman Group's Proposal. Had Statesman Bank not been permitted to book the $21 million cash contribution as regulatory capital and record the supervisory goodwill as an asset, Statesman Group's acquisition of the institutions on the financial terms proposed would have rendered the entire transaction senseless. As chairman of the boards of the negotiating entities, I was obligated not only by business sense, but also by fiduciary responsibilities to approve an acquisition only if the transaction would be economically sound.

Without the capital credit and the supervisory goodwill, Statesman Bank would have been insolvent for regulatory purposes at the time of the acquisition and subject to receivership and liquidation by FHLBB and FSLIC on the very same day the government delivered its turnkey bank. Simply stated, Statesman Group would have never made its Proposal without the fundamental requirement that the supervisory goodwill be an asset for regulatory purposes, and that $21 million of FSLIC's cash contribution be permanent capital.

12. The Proposal also called for additional regulatory considerations and forbearances, including a Regulatory Capital Maintenance Agreement ("RCMA"), waiver of certain debt restrictions that may apply to Statesman Group, authorization of certain cross-marketing activities and affiliate transactions by entities owned by Statesman Group, and other considerations and forbearances. Statesman Group also submitted to FSLIC a holding company application, Application H-(e)-1, dated February 12, 1988, which was subsequently amended to list the affiliate transactions in which Statesman Group planned to engage (the "Application"). P1. Exh. 2 is a true copy of Statesman Group's Application, which seeks approval of the acquisition.

13. Statesman Group would not have made a proposal which did not include the requested regulatory considerations and forbearances. The entire negotiations and Statesman Group's willingness to enter into the supervisory transaction on the financial terms set forth in the Proposal were absolutely conditioned on FHLBB's and FSLIC's agreement to permit Statesman Bank to engage in the affiliate transactions that required for bearances from certain regulatory restrictions and to operate at a level of

capital which was at least twice the amount required by then-applicable regulations. Absent all of the specified regulatory considerations and forbearances, Statesman Group either would have insisted upon receiving far greater tangible financial assistance from FSLIC, such as additional cash contributions or promissory notes, or would have withdrawn the Proposal.

14. It is my understanding that no other offer was made to acquire the four institutions that were specifically packaged for Statesman Group. The FHLBB issued Resolution No. 88-169 approving the transaction stating that Statesman Group's offer was "the most desirable alternative" and presented "the lowest expense and least risk to the FSLIC of any proposal submitted for any of the Associations." Pl. Exh. 15 is a true copy of FHLBB Resolution No. 88-169.

15. After FSLIC approved Statesman Group's Proposal, the parties began negotiating the terms of the Assistance Agreement, which was one of the primary operative acquisition contracts. As those negotiations were proceeding during the first week of March of 1988, it was understood by our lawyers and the law firm representing FSLIC that a closing would take place in April. However, on Tuesday, March 8, 1988, our outside counsel in Des Moines received a telephone call from FSLIC's outside counsel advising that FSLIC was not requiring that the closing take place in Florida on Friday, March 11, 1988. Although counsel for both FSLIC and Statesman Group agreed that this was nearly an impossibility, we advised that Statesman Group would fully cooperate in an attempt to meet FSLIC's self-imposed deadline. As a result, Statesman Group personnel and its counsel went to Washington, D.C. within three hours after receiving

that telephone call and resumed negotiations and document preparation on an around-the-clock basis. However, before dispatching personnel to Washington, D.C., we received oral confirmation that FSLIC would be in a position to close the transaction, resolve all open issues, and deliver Statesman Bank in a turnkey operation on March 11. Statesman Group was put at a substantial disadvantage because of this accelerated closing. In the first place, because Statesman Group was not presently in the banking business, it did not have key officers or management in position to open the bank on Monday morning, March 14. Secondly, we were not able to establish a Des Moines, Iowa depository facility prior to closing, thus necessitating an arrangement whereby the home office was temporarily relocated to Waterloo. Thirdly, Statesman Group had not yet received permission from its primary lender to enter into the acquisition. We advised FSLIC of these facts, as well as other obstacles which would be incurred as a result of the accelerated closing, and FSLIC gave us their assurance that all such matters could adequately be handled through appropriate forbearances.

16. Throughout the entire bidding and negotiating process between Statesman Group and FHLBB and FSLIC, it was understood by all parties that the entity that acquired Federated and the Waterloo Institutions would be able to record as supervisory goodwill the amount by which the market value of the four acquired institutions' liabilities exceed the market value of their assets. Furthermore, the Resolution No. 88-169 provided at pages 19 and 20 that Statesman Bank could amortize that goodwill over a period of time not to exceed 25 years.

17. As part of the transaction, FSLIC agreed to provide assistance in the form of cash and a

Promissory Note. Under the Assistance Agreement, FSLIC agreed to provide Statesman Bank with a cash contribution of $60 million, $21 million of which was credited to Statesman Bank's regulatory capital. Also under the Assistance Agreement a $5 million ten-year Subordinated Debenture that Statesman Bank delivered to FSLIC was credited to Statesman Bank's regulatory capital. The Assistance Agreement also required FSLIC to deliver a Promissory Note in the amount of the difference between the acquired associations' negative regulatory capital and the $60 million cash provided by FSLIC. FSLIC ultimately contributed $60 million of cash and a Promissory Note of $43 million which was subsequently adjusted to a principal amount of over $55 million as its contribution under the Assistance Agreement. Pl. Exh. 10 is a true copy of the Assistance Agreement entered into by FSLIC and Statesman Bank. Pl. Exh. 11 is a true copy of the Subordinated Debenture. Pl. Exh. 12 is a true copy of the initial $43 million Promissory Note.

18. Statesman Bank entered into a separate merger agreement with each of the Waterloo Institutions setting out the terms of the acquisition (the "Merger Agreements"). Pl. Exhs. 6, 7 and 8 are a true copies of the Merger Agreements.

19. Statesman Bank also entered into an acquisition agreement with FSLIC under which Statesman Bank agreed to purchase substantially all of the assets, and to assume substantially all of the liabilities of Federated (the "Acquisition Agreement"). P1. Exh. 9 is a true copy of the Acquisition Agreement.

20. As part of the transaction, Statesman Group, American Life, SSHC and Statesman Bank entered into the RCMA with FSLIC, under which Statesman Group and American Life agreed that they would maintain the regulatory capital of the Statesman

Bank in compliance with the regulatory capital requirements defined therein. Section 2 of the RCMA defined regulatory capital to include "amounts permitted by the FSLIC in the Assistance Agreement and in the forbearances issued in connection with the transactions discussed herein." Specifically, this contract required that FSLIC credit $21 million of its cash contribution and the $5 million debenture to Statesman Bank's regulatory capital. The RCMA further provided that these computations of regulatory capital "shall be perpetual." Under that Agreement, Statesman Group and American Life guaranteed to infuse up to $4 million of additional capital into Statesman Bank and SSHC as necessary to maintain Statesman Bank's regulatory capital at the levels required therein. Also, under the RCMA, Statesman Group granted FSLIC voting rights for the stock of SSHC, to be exercised in the event that Statesman Bank should in the future fail to satisfy minimum regulatory capital requirements. It should be noted that at no time during its existence did Statesman Bank's regulatory capital, as defined in the RCMA, even approach the level which would have required Statesman Group and American Life to make an additional capital contribution. P1. Exh. 13 is a true copy of the Regulatory Capital Maintenance Agreement.

21. In a separate forbearance letter, FHLBB set forth eleven enumerated regulatory forbearances that had been negotiated and agreed upon by Statesman Group and FHLBB, and which were essential elements of the parties' contractual agreements. The forbearance letter included FHLBB's agreement (a) not to enforce for five years regulatory capital deficiencies arising from specified items, including the acquired associations' liabilities and net worth deficiency, and (b) to include $21 million of FSLIC's

contribution, and the $5 million face amount of the Subordinated Debenture, in Statesman Bank's regulatory capital. P1. Exh. 14 is a true copy of the Forbearance Letter.

22. In accordance with the agreements and documents listed above, the supervisory merger between Statesman Bank and the four insolvent institutions was consummated on March 11, 1988. Statesman Group infused $21 million into SSHC, consisting of $12.6 million from Statesman Group in the form of Statesman Group preferred stock, and $8.4 million in cash from American Life. Statesman Group also delivered Statesman Bank's $5 million ten-year Subordinated Debenture to FSLIC.

23. As a result of the acquisition, Statesman Bank included $21 million of the FSLIC cash contribution and the $5 million face amount of the Subordinated Debenture as regulatory capital. This was specifically mandated by the Assistance Agreement, RCMA, FHLBB Resolution 88-169 and the FHLBB Forbearance Letter. The $21 million cash contribution was to be permanent capital, not subject to amortization. Statesman Group's Proposal and the accompanying pro forma financial statement schedules treated this $21 million as permanent capital, without amortization. Accordingly, consistent with that Proposal, which was accepted and approved by FHLBB and FSLIC, Statesman Bank did not amortize this permanent capital. After substantial debate and exchange of correspondence between Statesman Bank and the Des Moines office of FHLBB, Statesman Bank was required by FHLBB to amortize FSLIC's $21 million capital contribution, even though this action was contrary to Statesman Group's Proposal and Business Plan, which had been approved by FHLBB and FSLIC.

24. In reliance upon FSLIC's and FHLBB's written representations concerning the use of the purchase method accounting, the assets and liabilities of the four acquired institutions were adjusted to fair market value at the time of the acquisition, and the resulting excess of liabilities over assets was recorded on Statesman Bank's books as supervisory goodwill. As previously indicated, the FHLBB Resolution No. 88-169 specifically provided that in reporting to FHLBB and FSLIC, Statesman Bank could deviate from GAAP and could amortize its supervisory goodwill over a period not to exceed 25 years on a straight line basis. Notwithstanding the foregoing, Statesman Bank elected at the outset to amortize its supervisory goodwill in accordance with Generally Accepted Accounting Principles pursuant to Financial Accounting Standards Board Statement No. 72. This Statement provides that such goodwill is to be amortized over the estimated remaining lives of the long-term interest-bearing assets acquired on a level yield basis. Statesman Bank's Proposal and Business Plan provided for amortization over twelve years. Even though this Proposal was submitted far in advance of FHLBB's resolution allowing amortization over 25 years, Statesman Bank believed that it should amortize in accordance with its Business Plan which had been approved by FSLIC. The amount of supervisory goodwill ultimately recorded by Statesman Bank as a result of the acquisition was $27,874,583.

25. The passage of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), which was signed into law on August 9, 1989, imposed a dramatic change in the capital requirements of savings associations by adding Home Owners Loan Act § 5(t). FIRREA, and its implementing regulations, established three separate capital

requirements, all of which had to be met in order for a savings association to be in capital compliance. In essence, depending upon the specific requirement, supervisory goodwill was excluded for the most part in calculating capital under FIRREA. This meant that, absent any agreements to the contrary, the unamortized remaining supervisory goodwill acquired as a result of the purchase method of accounting *and* the unamortized portion of the $21 million capital credit (deemed by FIRREA regulations to be goodwill) had to be excluded in determining Statesman Bank's regulatory capital. As of September 30, 1989, the end of the last reporting period prior to the effective date of FIRREA, Statesman Bank's regulatory capital was $53.2 million, which was $15.8 million in excess of its pre-FIRREA required minimum of $37.4 million. Under the FIRREA tangible capital requirement, as interpreted by the Office of Thrift Supervision ("OTS"), the successor to FHLBB, Statesman Bank had *negative* tangible capital of $4,577,000. This dramatic overnight change in the capital position of Statesman Bank was the result of the refusal by OTS to honor the FSLIC and FHLBB agreements to record the acquired supervisory goodwill as an asset and to allow the $26 million of capital credits as part of Statesman Bank's capital.

26. As a sole result of OTS's refusal to honor the contractual commitments of FSLIC and FHLBB in computing capital, and its opinion that those contractual obligations were superseded by FIRREA, OTS concluded that Statesman Bank failed to meet any of the FIRREA capital requirements. The deficiencies in capital under the three tests were: (1) tangible capital deficiency of $13,852,000; (2) leverage ratio deficiency of $13,247,000, and (3) risk-based capital deficiency of $14,576,000, based upon September 30,

1989 computations. The new capital standards destroyed the financial well-being in regulatory terms of Statesman Bank, despite the fact that it was financially sound and conservatively managed.

27. If the FIRREA capital standards were applied retroactively to Statesman Bank as of the March 11, 1988 date of acquisition, and the contractual obligations to count supervisory goodwill and the capital credits were ignored, as they now have been, Statesman Bank would have had *negative* tangible capital of $8.9 million as of that date. In other words, Statesman Bank would have been insolvent at the very moment it was created. Clearly, therefore, the crediting of FSLIC's $21 million cash contribution and the $5 million Subordinated Debenture to Statesman Bank's permanent capital, and the booking of the $27.9 million of supervisory goodwill as an asset were relied upon by Statesman Group in evaluating and consummating the acquisition. Statesman Group would have never entered into such a transaction, and I do not believe that FSLIC or FHLBB would have authorized a transaction which would have immediately put Statesman Bank in a position of being taken over by the government. Thus, the willingness of Statesman Group and American Life to invest $21 million in cash and stock in Statesman Bank was absolutely conditioned on FHLBB's and FSLIC's agreement to permit Statesman Bank to report FSLIC's $21 million cash contribution and the $5 million Subordinated Debenture as regulatory capital and to amortize the $25,874,583 of supervisory goodwill over time. Absent the specified accounting treatment, Statesman Group either would have insisted upon receiving more than the $115 million in immediate tangible financial assistance from FSLIC or would have withdrawn the Proposal.

28. Statesman has complied in good faith with all the terms and conditions of the agreements relating to the supervisory merger and has otherwise fully performed its undertakings in connection therewith.

29. Since the acquisitions, Statesman Bank has performed well, achieving the purposes of the acquisitions. From March 11, 1988 through May 31, 1990, Statesman Bank reported a cumulative loss of approximately $4.7 million. This loss principally resulted from goodwill amortization of $7.3 million and $2.1 million loss provision related primarily to assets acquired on March 11, 1988, which did not reflect an actual current period loss, but rather, a re-evaluation of opening loss reserves. Also included in the financial results was an income-sharing payment to FSLIC in 1988 and interest payable to FSLIC under the Subordinated Debenture. On the other hand, extraordinary gains on the sale of investment securities, buildings and improvements and service corporation investments aggregated $2,319,000. If the foregoing amortization, extraordinary income and extraordinary expenses are eliminated, Statesman Bank actually earned a profit of $3,285,000 through May 31, 1990. This profit would have been substantially higher but for the dramatic negative impact of FIRREA and the losses and expenses incurred as a result of OTS's imposition of the FIRREA regulations on Statesman Bank. During this same period of time, Statesman Bank eliminated substantial expenses of the four predecessor institutions through the merger and consolidation of operations; absorbed the cost of administering a sizable volume of non-performing assets for the benefit of FSLIC; brought significant management talent and resources into the acquired insolvent mortgage banking subsidiary and turned it into a profitable entity; and foreclosed and

liquidated a sizable amount of the mortgage loans serviced by the mortgage banking subsidiary. In short, while incurring the substantial start-up expenses in consolidating the operations of the four insolvent thrifts, Statesman Bank actually experienced a positive cash flow and increased its tangible capital position significantly. Correspondingly, by acquiring the four institutions in March of 1988, and thus preventing the necessity of liquidation by FSLIC, the acquisition not only saved FSLIC millions of dollars, but also saved the jobs of hundreds of people and preserved important services for thousands of savers, home buyers, and other customers in the communities served by the four acquired insolvent associations.

30. If FIRREA would have been in effect on the date of acquisition, Statesman Group would have required an additional $28 million of FSLIC cash or note assistance to Statesman Bank before entering any agreement to purchase the four insolvent institutions. This amount would have been necessary to put Statesman Bank in a position of having capital which was at least twice the amount required for regulatory purposes, which was an absolute condition precedent to Statesman Group's willingness to enter into the transaction. Without significant additional assistance, Statesman Bank and the transaction itself would have been financially unsound from a regulatory standpoint.

31. In entering into the acquisition, Statesman Group acquired an asset (Statesman Bank) which it reasonably believed would provide a reasonable rate of return on its investment and, at the same time, provide a financial service institution which would complement the other subsidiaries of Statesman Group through cross-marketing and affiliate transactions. It is my understanding and belief that the cost

to FSLIC to have liquidated the four insolvent associations would have exceeded $200 million. By FSLIC's own admission, it saved approximately $50 million in liquidation costs by packaging these four associations and consummating the transaction with Statesman Group. This transaction, and the immense resulting cost savings to FSLIC could not possibly have occurred without the contractual commitments of FSLIC and FHLBB to permit capital credits in the amount of $26 million and to permit the carrying of the supervisory goodwill of $27.9 million as an asset of Statesman Bank. These agreements by FSLIC and FHLBB did not cost the government any money, but provided the essential consideration which induced Statesman Group to enter into the acquisition agreements.

32. Because OTS, subsequent to FIRREA, has repeatedly refused to count the $26 million of capital credits received by contract in the acquisition, and disallowed the supervisory goodwill, Statesman Bank does not satisfy the three new capital standards of FIRREA. Accordingly, Statesman Bank was subjected to restrictions and penalties relating to FIRREA's capital requirements solely because of the repudiation of FSLIC's and FHLBB's agreements with Statesman Group.

33. On January 5, 1990, Statesman Bank submitted a Capital Plan, together with a proposed modification and extension of the March 1988 acquisition agreements. This filing was made in response to a letter "notification" from Steven L. Opsal, Supervisory Agent with OTS in which OTS advised Statesman Bank that as a "troubled" institution, it was subject to OTS's revised growth restrictions policy which "supersedes any growth restrictions to which you may have been subject." The letter also directed

Statesman Bank to submit a Capital Plan by January 8, 1990. P1. Exh. 17 is a true copy of the OTS notification letter. P1. Exh. 18 is a true copy of Statesman Bank's Capital Plan.

34. Consistent with its requirements in the original acquisition, Statesman Group and Statesman Bank, in their Capital Plan, utilized a conservative approach which required that the capital be raised to a level which would be at least twice the amount of the prevailing regulatory requirement. By letter dated March 13, 1990, from Richard G. Sheppard, Deputy District Director of the Des Moines office of OTS, Statesman Bank's Capital Plan was denied. Accordingly, Statesman Bank was immediately subjected to lending and investment restrictions because it did not, according to OTS, meet the FIRREA capital standards. P1. Exh. 19 is a true copy of this OTS denial letter.

35. As a result of the denial by OTS of Statesman Bank's Capital Plan, Statesman Bank submitted to OTS a written demand ("Demand") that OTS calculate its capital in compliance with the contractual obligations undertaken by FSLIC and FHLBB at the date of acquisition. Specifically, the Demand required that the contractual capital credits of $21 million in FSLIC cash contribution and the $5 million Subordinated Debenture continue to be counted as capital. Although Statesman Bank also believed that it was entitled to continue to report as an asset its supervisory goodwill acquired through the purchase method of accounting, the Demand focused solely on the breach by OTS of the FSLIC and FHLBB contractual commitments to perpetually credit to Statesman Bank's capital the remaining unamortized portion of the original $26 million capital credits. Those capital credits were required by the Assistance

Agreement, RCMA, FHLBB's Resolution 88-169 and the Forbearance Letter from FHLBB. The Demand demonstrated that if OTS would simply adhere to these contractual obligations alone, Statesman Bank would meet all three FIRREA capital standards. By letter dated April 2, 1990, from Donald W. Wente, District Director of the Des Moines office of OTS, that Demand was denied. In doing so, OTS did not respond to the contractual issue, but merely claimed that FIRREA eliminated all previously granted capital and accounting forbearances. In other words, OTS took the position that as to the government, its contracts were mere forbearances subject to change. P1. Exh. 20 is a true copy of Statesman Bank's Demand. P1. Exh. 21 is a true copy of this OTS denial letter. At no time did Statesman Group ever believe that FSLIC or FHLBB, or their successors-in-interest, would be able to breach their contractual commitments regarding the crediting of permanent capital to Statesman Bank and the allowance of supervisory goodwill as assets of Statesman Bank. We did recognize that changes in the law could occur which could impact regulatory requirements. This is one reason why we insisted that Statesman Bank's regulatory capital be twice the amount required. This is also the reason that we insisted that the crediting of the capital and the allowance of supervisory goodwill be incorporated into the written contractual agreements. Accordingly, it was, and is still our belief, that the subsequent enactment of FIRREA, which did in fact change the requirements, does not authorize OTS, as the successor to FHLBB, to disavow its contractual obligations.

36. Because of the denial by OTS of Statesman Bank's Capital Plan and its Demand to compute capital in compliance with the acquisition contracts,

OTS advised Statesman Bank in March of 1990 that it was a savings association "subject to greater restrictions" under Regulatory Bulletin 3a-1. As a result, numerous lending, investment and other restrictions were imposed upon Statesman Bank. These restrictions caused Statesman Bank to be at a substantial competitive disadvantage in the marketplace. The utilization of FIRREA as a means to breach its contractual obligations to Statesman Bank, and thus conclude that Statesman Bank did not meet the capital requirements, resulted in OTS taking an even more active role in the direction and control of Statesman Bank's business operations.

37. Statesman Bank's managerial discretion, which has produced a record of conservative, sound and efficient management, was greatly circumscribed. In addition, the collateral consequences of the restrictions imposed by FIRREA and the OTS capital regulations were equally damaging. For example, Statesman Bank's ability to attract and retain deposits, as well as its ability to borrow in capital markets, was impaired. The restrictions also reduced Statesman Bank's ability to generate profitable mortgages and other loans, reduced its access to secondary mortgage markets, and impaired its ability to generate profits. The asset growth restrictions reduced Statesman Bank's ability to obtain the advantages of growth available to thrifts, banks and other financial institutions competing with it for the provision of mortgages and other loans and services in its market area. Moreover, the restrictions imposed under FIRREA and the OTS capital regulations impaired Statesman Bank's ability to serve the needs of savers and home buyers in its market area. In these and countless other ways, Statesman Bank was denied the benefits of including its supervisory

goodwill, the $21 million capital credit and the $5 million face amount of the Subordinated Debenture in capital for purposes of complying with regulatory capital requirements—benefits that Statesman Group contracted for in their agreements with FSLIC and FHLBB.

38. Throughout the history of Statesman Bank's relationship with the Des Moines office of FHLBB, and its successor, OTS, Statesman Bank met continuing resistance in its efforts to conduct its operations in a manner consistent with the acquisition agreements. The acquisition was negotiated with the Washington office of FSLIC and approved by the Washington office of FHLBB. Unlike many other acquirers of insolvent associations, Statesman Group was not currently in the banking or thrift industries. Nevertheless, Statesman Group was accustomed to governmental regulatory supervision by virtue of its insurance, investment banking and mortgage banking subsidiaries. It was my understanding that FSLIC was attempting to attract capital from sources outside the existing thrift industry for the acquisition of insolvent thrifts during 1988, and the consummation of the transaction with Statesman Group might prompt other outside investors to acquire such thrifts, thus bringing new sources of funds to help minimize the growing savings and loan problem.

39. By way of illustration of the interference caused by FHLBB and OTS, I would like to refer to the situation involving the establisment of the home office in Des Moines, Iowa. Because of the accelerated closing of the acquisition, Statesman Bank had not yet had the opportunity of establishing a depository facility in Des Moines. I had made it perfectly clear to FSLIC that Statesman Group would not consummate the acquisition unless it had an absolute guarantee

that the home office of Statesman Bank would be in Des Moines. FSLIC advised that it was necessary to have a depository facility in the city in which the home office was located. In order to accommodate the accelerated closing, FSLIC gave me its assurance that the home office would be in Des Moines, and that FSLIC would establish a procedure by which this could be automatically accomplished. I advised FSLIC that under no circumstances would Statesman Group go through the traditional application procedures for establishing a different home office location once the acquisition was completed. In compliance with its representations regarding this issue, FSLIC chartered the bank with its home office in Des Moines. Also at page 35 of FHLBB's Resolution No. 88-169, FHLBB dealt with this issue and stated as follows:

> RESOLVED FURTHER, That New Federal's (Statesman Bank) home office is hereby temporarily redesignated to be located in Waterloo, Iowa, and such location shall revert to Des Moines, Iowa, upon New Federal's selection of a site there and the PSA's approval of such site.

It was agreed that the only thing necessary to relocate the home office to Des Moines was to have Statesman Bank advise FHLBB of the actual site and obtain approval for that site.

Notwithstanding the clarity and binding nature of the FHLBB resolution, OTS took the position that it was necessary for Statesman Bank to go through all of the ordinary application procedures in order to relocate its home office to Des Moines. As a result, Statesman Bank's application was protested by a citizens' group in Waterloo. This resulted in a hearing

and substantial adverse publicity to Statesman Bank regarding its lending practices. Even though the evidence demonstrated that Statesman Bank had the most favorable record of lending in low-income areas, the publicity in Waterloo had a dramatic negative impact on Statesman Bank. On two occasions, the citizens' group picketed the bank and even tied a red ribbon around the bank.

The failure by OTS to honor the FHLBB resolution regarding the home office issue caused substantial harm to Statesman Bank. This is illustrative of the substantial interference experienced by Statesman Bank and Statesman Group throughout its course of dealings with the Des Moines office of FHLBB and OTS.

Statesman Bank's initial request to relocate the home office, pursuant to the FHLBB resolution, was made on October 16, 1989. After being put through the entire hearing process, OTS did not render its final decision approving that relocation until the day before Statesman Bank was taken over by the Resolution Trust Corporation ("RTC"), which approval simply facilitated the takeover by allowing it to occur in Des Moines.

40. On July 26, 1990, the Director of OTS, by Order Nos. 90-1425 and 90-1427, appointed the RTC receiver and conservator for Statesman Bank. OTS notified Statesman Bank of its appointment on July 27, 1990 and, on that same day, RTC took possession of Statesman Bank. P1. Exh. 22 is a true copy of Order Nos. 90-1425 and 90-1427.

41. In capsule summary form, Statesman Group was desirous of acquiring the four insolvent thrifts so that it could enter the banking business and also acquire the mortgage banking subsidiary of Federated. As an inducement to Statesman Group, and as

a fundamental part of the consideration of the transaction, FSLIC agreed that $21 million of its cash contribution and the $5 million Subordinated Debenture issued by Statesman Bank would be counted by Statesman Bank as permanent capital for regulatory purposes. As further consideration for the transaction, FSLIC likewise assured Statesman Group that the supervisory goodwill acquired by Statesman Bank in the transaction would be an asset of Statesman Bank for regulatory accounting purposes. These agreements were reduced to writing in the Assistance Agreement, RCMA, FHLBB Resolution 88-169 and the FHLBB Forbearance Letter, all of which were integral parts of the contractual relationships between and among the parties. At all times subsequent to the acquisition, Statesman Bank substantially exceeded regulatory capital requirements.

FIRREA and its implementing regulations significantly changed capital requirements for thrifts. Without the benefit of the contractual obligations regarding Statesman Bank's capital credits and supervisory goodwill, Statesman Bank did not meet any of the new FIRREA capital standards. OTS, as successor to FHLBB, refused to honor the FHLBB and FSLIC contractual obligations regarding Statesman Bank's capital and found that Statesman Bank was unsafe and unsound, even though its tangible capital position continually improved from the date of the original acquisition, and thus, more safe and more sound than it was on March 11, 1988 when it was delivered to Statesman Group by the government. By breaching these contracts, OTS then appointed the RTC as receiver and conservator for Statesman Bank and took all of Statesman Bank's assets and liabilities, *including* Statesman Group's initial cash and stock contribution. In essence, the government induced

Statesman Group to invest $21 million in Statesman Bank; Statesman Group improved both the operating and financial condition of Statesman Bank, and then some 28 months later the government confiscated the bank and Statesman Group's $21 million investment.

I hereby certify that the foregoing statements are true and correct, to the best of my knowledge and belief.

Dated this 5th day of September, 1990.

/s/ D.J. Noble
D.J. Noble

Subscribed and sworn to before me this 5th day of September, 1990.

/s/ William L. Fairbank
Notary Public

My Commission Expires:
6-14-93

UNITED STATES CLAIMS COURT

Civil Action No. 90-772

GLENDALE FEDERAL BANK, FSB
700 North Brand Boulevard
Glendale, California 91201, *Plaintiff,*

v.

THE UNITED STATES, *Defendant.*

COMPLAINT

Plaintiff Glendale Federal Bank, FSB ("Glendale"), through its undersigned counsel, files this Complaint against defendant The United States, and states as follows:

NATURE AND SUMMARY OF THIS ACTION

1. This is an action for breach of contract, restitution, and deprivation of property without just compensation or due process of law. Plaintiff Glendale's claims are based upon (1) its written contract dated November 19, 1981, with the Federal Savings and Loan Insurance Corporation ("FSLIC"), an agency of the United States; (2) the breach, frustration and abrogation of that contract by the United States, acting through various agencies and officials; and (3) other government conduct resulting from or related to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"),

regulations promulgated under FIRREA, and acts and omissions of government agencies and officials relating to FIRREA and the FIRREA regulations. For relief, Glendale seeks (a) restitution of money it paid directly to FSLIC pursuant to and in accordance with Glendale's contract with FSLIC; (b) restitution of other benefits conferred upon the United States pursuant to the contract, which constitute unjust enrichment of the United States at Glendale's expense; (c) damages to compensate Glendale for the consequences of the government's breach, frustration and abrogation of the contract, the unconstitutional taking of Glendale's property, and the other unlawful government conduct described below; and (d) other appropriate contractual, declaratory, and injunctive relief.

2. In brief summary, this case involves deliberate conduct by the United States government in reneging on a fundamental contractual commitment made to Glendale. The government's conduct is especially shocking because the contract at issue facilitated the successful acquisition by Glendale, a strong and healthy thrift institution, of another thrift institution that was weak and failing, and thereby relieved the government of the burden of resolving a substantial "problem case" in the burgeoning thrift industry debacle.

3. Glendale's 1981 contract with FSLIC set forth the terms and conditions pursuant to which the United States would and did approve Glendale's acquisition of the other, failing thrift. The contract expressly incorporated the government's commitment that Glendale could count goodwill acquired in the transaction as an asset for regulatory capital purposes and amortize it over 40 years. Indeed, the United States expressly *required* that Glendale count goodwill as capital, pursuant to generally accepted

accounting principles ("GAAP") and regulatory standards, and neither Glendale nor FSLIC would have or could have approved the 1981 contract or Glendale's acquisition of the other thrift *unless* the goodwill Glendale acquired was included in regulatory capital.

4. Pursuant to the 1981 contract, Glendale paid the United States approximately $18.4 million, and Glendale has fully and faithfully performed all its other obligations under the contract.

5. The United States, however, has now reneged on its fundamental contractual commitments concerning goodwill. As a result of FIRREA, the FIRREA regulations, and government conduct following FIRREA, the United States now requires—contrary to its contractual commitment to Glendale, and contrary to GAAP principles—that most of the goodwill Glendale acquired in the 1981 transaction *not* be counted as an asset for regulatory capital purposes.

6. The effect of the government's blatant reversal is that for regulatory purposes Glendale now must *deduct* from its certified financial statements—which are prepared in accordance with GAAP and the 1981 contract—approximately $675 million in as-yet unamortized goodwill, even through the government originally promised that Glendale could include the goodwill, amortized over 40 years, as an asset for regulatory capital purposes, and even though neither FSLIC nor Glendale would have (or could have) approved or consummated the 1981 acquisition without full regulatory recognition of the goodwill Glendale acquired.

7. Even without counting the goodwill as regulatory capital, Glendale meets and will continue to meet all regulatory capital requirements imposed by FIRREA. Glendale is large enough and strong enough that the $675 million deduction now required by the

government—solely for regulatory capital purposes, and not for GAAP or any other financial reporting purposes—does not prevent Glendale from complying with FIRREA's stringent capital requirements. But the government's conduct nonetheless represents a fundamental breach, frustration and abrogation of the 1981 contract, and constitutes a deprivation of Glendale's valuable property in violation of applicable constitutional requirements. For that unlawful government conduct, Glendale seeks relief in this action—in the form of restitution of the $18.4 million Glendale paid directly to the government, and other appropriate contractual, constitutional and other relief.

JURISDICTION

8. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. § 1491(a)(1) and (3).

THE PARTIES

9. Glendale is a federally-chartered savings bank with over $25 billion in assets and branch offices in California, Florida and Washington State. Glendale was a federally-chartered savings and loan association until 1989, when Glendale's savings and loan charter was converted to a savings bank charter with no significant effect on Glendale's operations. At all times relevant to this action, Glendale has been one of the largest thrift institutions in the country, and has been conservatively managed, well-run, profitable and devoted to serving the savings and borrowing needs of its customers.

10. First Federal Savings and Loan Association of Broward County ("Broward") was, until its merger into Glendale effective November 19, 1981, a federally-chartered savings and loan association based in Florida. Prior to the merger, Broward's deposit accounts were insured by FSLIC.

11. FSLIC was an agency of the United States until abolished by FIRREA in 1989. FSLIC insured the accounts of depositors up to $100,000 in certain savings institutions, including Broward and Glendale, and also enforced compliance by such institutions with various regulatory requirements designed to safeguard FSLIC's deposit insurance fund.

12. The Federal Home Loan Bank Board ("FHLBB") was an agency of the United States until abolished by FIRREA. FHLBB was charged with, among other things, regulating federally-chartered savings and loan associations and savings banks, acting as the operating head of FSLIC, enforcing compliance by such institutions with various regulatory requirements, and approving merger agreements for failing thrifts.

13. The Federal Deposit Insurance Corporation ("FDIC") is an agency of the United States. Under FIRREA, FDIC is designated as the successor to FSLIC for purposes relevant to this action.

14. The Office of Thrift Supervision ("OTS") is an agency and the Director of OTS is an officer and agent of the United States. Under FIRREA, OTS and its Director are designated as the successor to FHLBB for purposes relevant to this action.

15. FIRREA provides that it "shall not affect the validity of any right, duty, or obligation" of the United States, FSLIC, FHLBB, or "any other person" which arose prior to FIRREA, and that "all orders, resolutions, determinations, and regulations"

of FSLIC and FHLBB prior to FIRREA "shall continue in effect" according to their terms and "be enforceable by or against" FDIC or the Director of OTS, as the case may be, until terminated or superseded "in accordance with law."

STATEMENT OF FACTS

The Contract and its Purpose

16. On November 19, 1981, Glendale and FSLIC entered into the written contract that is at the heart of this case. That contract, titled a "Supervisory Action Agreement," expressly provided that its term would be for 10 years and that the obligations of the FSLIC under the contract could terminate earlier than 10 years after execution of the contract only under certain specified conditions, none of which have occurred.

17. The contract was subject to certain conditions, approvals and resolutions of the FHLBB, which conditions, approvals and resolutions were satisfied or obtained and are incorporated by reference as part of the contract.

18. The purpose of the contract between Glendale and the United States was to facilitate the acquisition by merger of Broward, a weak and failing savings institution, by and into Glendale, a large and healthy institution, and thereby to relieve FSLIC's potential liability as the insurer of Broward's deposit accounts on terms that made financial sense for both Glendale and the United States. To this end, FSLIC and FHLBB, as agents and instrumentalities of the United States, agreed to provide certain approvals and contractual assurances to Glendale, and Glendale agreed to certain terms and conditions required by

the United States. Among the most significant of the government's assurances was its commitment that Glendale could include the goodwill Glendale acquired in the merger as an asset for regulatory capital purposes.

The Origins of the Broward Merger

19. Unlike some other mergers of failing thrifts at the time, and an increasing number of such mergers as the savings and loan "crisis" developed through the 1980's, the merger of Glendale and Broward was a straight business deal initiated with little input from FSLIC or FHLBB. Motivated by its weakening financial condition, Broward originally contacted Glendale, and those two parties negotiated and ultimately executed the Merger Agreement pursuant to which the merger occurred.

20. FSLIC and FHLBB, however, had a vital interest in certain financial and regulatory aspects of the transaction, and Glendale was required by law to obtain FHLBB approval for the merger. FSLIC had an interest in facilitating and assisting the merger in order to avoid having to pay off Broward's depositors should Broward's financial condition continue to deteriorate. Most importantly, FHLBB and FSLIC also were interested in assuring that their agreement to extend FSLIC insurance to Glendale's deposit accounts *after* the merger would represent a prudent underwriting decision. For these reasons, the Merger Agreement between Broward and Glendale expressly conditioned consummation of the merger upon, among other things, FHLBB approval of the transaction.

21. Broward was seeking to be acquired by a stronger thrift because Broward was losing money and its financial condition was deteriorating due to adverse business conditions then confronting the

thrift industry. As a result of the unprecedented high interest rates prevailing in the late 1970's and early 1980's, Broward, like many other thrifts, was forced to pay higher interest rates to retain and attract new deposits. At the same time, it could not increase the lower rate of return on the longterm, fixed-rate residential and other real estate mortgages that constituted the bulk of its income-generating assets, nor could it originate new mortgages at a higher rate, because of Florida law's "usury" ceiling on such loans.

22. As a result of the substantial "negative spread" between Broward's cost of funds and its return on assets, in late 1981 Broward was losing about $4 million per month on operations. Significantly, unlike some other thrifts at the time—and increasingly later in the 1980's—Broward's business problems did not result from asset-quality problems such as bad loans. Broward was a conservatively managed institution that had been serving the South Florida community for more than forty years. Broward was seeking a merger partner in late 1981 not because of mismanagement or bad loans, but because of problems resulting almost exclusively from the prevailing high interest rates and Broward's resulting negative interest rate spread and significant operating losses.

23. Broward also was responsible enough to seek an early solution. At the time the merger with Glendale closed in November of 1981, Broward still had a positive net worth under GAAP of about $57 million on total assets of about $2.6 billion. At the same time, Glendale was a large and healthy thrift with about $5 billion in assets and GAAP net worth of approximately $300 million.

24. Glendale immediately became interested in the Broward merger when Broward made the initial contact, for good business reasons. Specifically, Glendale was interested in acquiring Broward because,

among other things (a) the transaction would give Glendale a major operating presence in Florida, one of the top five thrifts markets in the country, in addition to the large California market to which Glendale previously had been limited by restrictions on interstate operations by thrifts; (b) Glendale would acquire Broward's substantial deposit base, as well as Broward's substantial number of existing deposit and loan customers; and (c) by acquiring Broward on a going-concern basis, Glendale would succeed to the excellent, long-standing reputation of Broward among depositors, borrowers, the real estate industry and the entire business community in South Florida. None of these elements would have interested Glendale, however, without the commitment from the United States that the goodwill Glendale acquired in the transaction, amortized over forty years, would be included as an asset for regulatory capital purposes.

25. Though Glendale's discussions with Broward commenced and continued at a time when Broward still was viable, Broward's condition was worsening at the rate of $4 million per month. Broward's deteriorating financial condition threatened FSLIC's deposit insurance fund. Indeed, the Supervisory Action Agreement recites as a preamble that "[t]he FSLIC has decided ... to provide assistance as set forth in this Agreement, having determined that [Broward] is in danger of default and that the nature and/or amount of such assistance would be less than the losses FSLIC would sustain upon the liquidation of [Broward] through a receivership accompanied by the payment of insurance of accounts." The contemporaneous FHLBB resolution approving the merger similarly recites as a preamble that "the proposed merger and execution of [the] Supervisory Action

Agreement ("SAA") with Glendale would be undertaken pursuant to an action by the FSLIC to prevent the failure of Broward."

26. Notwithstanding the above FHLBB and FSLIC findings, at the time of the merger Broward's deposit base, Florida markets, customers and reputation were of value to Glendale, but only on the condition—required and contractually agreed to by the government—that the goodwill Glendale acquired in the merger would be included as an asset and amortized over forty years for regulatory capital purposes.

The Fundamental Terms of Glendale's Contract with the Government

27. Because of a variety of financial, regulatory and other considerations, as well as the legal requirement of FHLBB approval for the merger, Glendale understood from the outset that it would have to reach a mutually acceptable agreement with FHLBB and FSLIC concerning a number of issues. Under prevailing regulatory practices, such agreements were set forth in written contractual form.

28. As Glendale's negotiations with Broward progressed, Glendale focused on two sets of issues, both of which involved FHLBB and FSLIC and required their concurrence, that had to be addressed and resolved to make the deal work. One was the proper method of accounting for the merger and certain related financial matters, and the other was a variety of miscellaneous waivers or agreements concerning regulatory requirements that Glendale otherwise could not meet after the merger in view of Broward's condition. Glendale commenced discussions with FHLBB and FSLIC aimed at obtaining their approval and agreement on these issues.

29. The accounting issues were straightforward. Under GAAP, and in accordance with prevailing FHLBB requirements at the time of the merger, as set forth in FHLBB Memorandum R-31b, the acquisition of Broward by Glendale was to be accounted for under the "purchase method" of accounting.

30. Under purchase accounting (which, under GAAP, is applied to most corporate acquisitions in all industries), the book values of the tangible assets and liabilities of an acquired entity are adjusted to fair value ("marked to market") on the date of the acquisition. Any excess in the cost of the acquisition over the market value of tangible assets acquired is recorded as "goodwill" on the books of the acquiring institution. The cost of the acquisition includes, of course, all liabilities assumed by the acquiror.

31. As explained further below, this "goodwill" is an intangible but well-recognized and valuable asset, and as an accounting matter is to be amortized over a period of up to 40 years. In accounting terms, goodwill is classified as an "asset" because it represents something what will benefit future period—*i.e.*, the customers, deposit base, new markets and going-concern value of the acquired institution—and the period for amortization represents an estimate of the period to be benefitted by the valuable goodwill.

32. Concerning Broward, rising interest rates had caused a corresponding and significant decline in the market value of Broward's fixed-rate loans, its major assets. At the same time, the market value of Broward's liabilities (principally obligations to depositors, whose accounts by that time were variable rate) was comparable to the book value of those deposit liabilities. Accordingly, while Broward's net worth measured at book value pursuant to GAAP was

approximately $50 million, the fair value of its liabilities exceeded the fair value of its assets at the time of the merger by approximately $750 million.

33. In acquiring Broward, Glendale necessarily acquired not only its assets but also its liabilities to depositors. It was also clear under GAAP and FHLBB requirements, which prescribed purchase accounting as noted above, that Broward's assets and liabilities would be "marked to market" on the date of the merger, and thus Glendale, at closing, would place on its books $750 million more of liabilities than of tangible assets acquired from Broward.

34. Purchase accounting thus posed two fundamental issues for Glendale. First, Glendale had to decide whether it wanted in effect to pay a $750 million premium for Broward's tangible assets, by assuming $750 million more in liabilities than in assets acquired. And second, Glendale had to be certain that the goodwill it would book and amortize over forty years under purchase accounting, in the amount of $750 million, would be recognized and accepted as an asset under GAAP not only for accounting purposes but also for regulatory capital purposes. If the goodwill would not count towards meeting Glendale's regulatory capital requirements, as the tangible assets it acquired from Broward did at their book value, then Glendale faced a potential shortfall of up to $750 million in regulatory capital on the date of the merger. Glendale simply would not and could not have exchanged the book value of Broward's tangible assets, for the goodwill that GAAP and FHLBB policy provided in return, unless it was clear that both counted equally toward Glendale's regulatory capital requirements. As explained further below, FHLBB and FSLIC also would not and could not have approved the transaction, or entered into the

Supervisory Action Agreement, without the requirement that the goodwill acquired in the transaction would be recognized as part of Glendale's regulatory capital.

35. In addition to the government's assurances relating to goodwill, Glendale was willing to make the business decision to absorb the $750 million in excess liabilities only subject to another important condition. The condition was this: although Glendale was confident that it could weather the prevailing high interest rates and ultimately reverse Broward's operating losses, Glendale was not willing to take the additional risk that interest rates would stay high indefinitely, or even increase, thus compounding Broward's operating losses. Glendale therefore decided to negotiate for contractual protection, from FSLIC, against the possibility of continued and increasingly high interest rates.

36. FSLIC was willing to provide such protection, but only if Glendale in turn agreed to pay certain sums to FSLIC, according to a fixed formula, in the event interest rates declined in the years after the merger. The ultimate agreement on this point, which is expressly set forth in the Supervisory Action Agreement, represents a basic element of the agreed-upon consideration that Glendale provided the United States in return for the government's promises. That is, as consideration for the Broward merger and the government's approval of it on the terms agreed between Glendale and FSLIC, including the regulatory treatment of goodwill discussed above, Glendale agreed effectively to pay $750 million by assuming excess liabilities in that amount (and thus to relieve FSLIC of its potential exposure to pay off Broward's depositors); Glendale agreed to make the interest rate protection payments to FSLIC should interest rates

decline; and Glendale agreed to a few miscellaneous other terms of the Supervisory Agreement not relevant here. Glendale also agreed, of course, to take on the responsibility for operating Broward.

37. The interest rate protection provision provided for the only "hard-cash" financial consideration that changed hands pursuant to the Supervisory Action Agreement. Neither Glendale nor FSLIC agreed to invest any cash or other assets in Broward, and neither party agreed to pay the other any money other than pursuant to the interest rate protection provision which was negotiated and agreed as a basic condition to Glendale's agreement to assume $750 million more in liabilities than it was receiving in tangible assets.

38. Pursuant to and in accordance with Section 5 of the Supervisory Action Agreement, which contains the interest rate protection provision, Glendale paid directly to FSLIC $18.4 million in cash equivalents.

39. Glendale and FSLIC also readily reached agreement on the other fundamental issue posed by purchase accounting—the treatment of goodwill for regulatory capital purposes. Indeed, FHLBB and FSLIC had their own reasons for desiring *and requiring* that the goodwill Glendale acquired be counted as an asset for regulatory capital purposes. FHLBB was required by law to determine, on behalf of FSLIC, that FSLIC prudently could and should continue to insure the deposit accounts of Glendale after the merger. If the goodwill that Glendale acquired and recorded in accordance with GAAP and FHLBB requirements did not count as regulatory capital—that is, if Glendale was to book Broward's tangible assets at their $750 million lower market value, without including the corresponding and offsetting amount of goodwill in regulatory capital—

Glendale immediately following the merger would have had a regulatory capital shortfall of up to $750 million. In that circumstance, neither FHLBB nor FSLIC would or could have approved the underwriting decision to insure Glendale's accounts after the merger.

40. Accordingly, one of the terms and conditions expressly required by the United States for approval of the merger and for entering into the Supervisory Action Agreement was that Glendale "determine and amortize" any goodwill acquired in the transaction pursuant to GAAP and FHLBB Memorandum R31-b. Glendale readily agreed to this condition, for reasons outlined above. Indeed, without this condition, which is expressly set forth in the FHLBB resolution approving the Supervisory Action Agreement and incorporated by reference into the Agreement, the merger would have made no economic sense for Glendale and no sense, as a regulatory matter, for the FHLBB or the FSLIC. That is because, had Glendale been forced to assume all the excess liabilities of Broward without a corresponding set-off of goodwill, it would have been hopelessly under-capitalized and itself subject to regulatory takeover or other supervisory measures by the FHLBB. Neither Glendale nor FHLBB would have or could have agreed to a transaction that had that effect.

41. The Supervisory Action Agreement also was approved by the FHLBB subject to another express condition—the furnishing of a satisfactory opinion letter from Glendale's independent accountants "substantiat[ing] the reasonableness of amounts attributed to goodwill ... and the resulting amortization periods and methods." Glendale duly supplied the required opinion letter, which also expressly stated that the bulk of the goodwill acquired in the merger "will be amortized on a straight line basis over 40 years...."

42. Thus, inclusion of goodwill as an asset for regulatory capital purposes, to be amortized over forty years, was a fundamental condition of the transaction and assumption by both contracting parties, and was expressly agreed as a term of the parties' written contract. It was also the element of the contract which most fundamentally expressed the purpose of the Supervisory Action Agreement: for the United States, to safeguard depositor funds by extending FSLIC insurance to Glendale after the merger, and thereby to relieve itself of a potentially massive FSLIC obligation should Broward have to be liquidated; and for Glendale, to make the acquisition of Broward economically feasible given the financial terms dictated by Broward's financial condition. There is no question whatsoever that, without the commitment to allow Glendale to include goodwill as an asset for regulatory capital purposes, neither party could have even considered for one second the possibility of entering into the Supervisory Action Agreement.

43. As for the various miscellaneous agreements and waivers that Glendale required in order to meet applicable regulatory requirements after taking on Broward's operations, the parties had no trouble reaching appropriate terms after the fundamental issues discussed above were agreed. The Supervisory Action Agreement incorporates all of these subsidiary terms which formed a part of the contract between the parties.

Passage of FIRREA

44. In 1989, eight years after FSLIC and FHLBB entered into the contract with Glendale, FIRREA was enacted into law. FIRREA completely upset the fundamental assumptions of both parties to the

Supervisory Action Agreement. FIRREA provides, in relevant part, that goodwill such as Glendale acquired in the Broward merger, and which the FHLBB and FSLIC *required* Glendale to book and amortize over a period of up to 40 years, generally must be *deducted*—for purposes of determining compliance with OTS minimum capital requirements—from Glendale's capital as shown on Glendale's certified financial statements. The only exception provided in FIRREA permits a declining portion of goodwill to be counted for certain regulatory purposes during a brief phase-out period.

45. OTS has promulgated implementing regulations related to FIRREA's requirements regarding goodwill such as Glendale acquired in the Broward merger. As further explained below, in some respects those regulations exceed even FIRREA's requirements, and thus constitute agency action independently giving rise to Glendale's causes of action here.

Glendale's Claims for Restitution and Unjust Enrichment

46. By rescinding its contractual promise—indeed, its contractual *requirement*—that the goodwill Glendale acquired through its merger with Broward be considered as an asset for regulatory capital purposes, the United States has retroactively so altered the benefits and burdens of the bargain it struck with Glendale in 1981 as to render that agreement a nullity. With a wave of its legislative wand, the United States has transformed FSLIC's potential insurance liability owed to Broward's depositors in 1981 into a massive writedown—for regulatory capital purposes—on Glendale's books today.

47. Having rid itself of a potentially massive insurance obligation to Broward's depositors with its

contractual promise that Glendale could include goodwill as an asset for regulatory capital purposes and amortize the goodwill over a period of up to 40 years, the government has now blithely rescinded that promise. The United States today would require Glendale to retain essentially similar liabilities to those FSLIC avoided in 1981, but without the offsetting goodwill that the government originally agreed and *required* that Glendale book and without which neither party could have or would have accepted the Broward merger.

48. These actions of the United States render the "Supervisory Action Agreement" a nullity. The fundamental assumptions of the parties as to the existing facts on which it was premised have proved to be mistaken, the contract has been breached, and its basic purpose has been frustrated. For these reasons—and because Glendale would never have paid the United States the $18.4 million but for the government's commitments concerning goodwill—Glendale is entitled to restitution of the benefits it has conferred upon the United States through entering into that agreement, including, but not limited to, the $18.4 million it paid to the government as part of the mutually agreed exchange of promises and consideration. Glendale also is entitled to damages as explained further below.

Glendale's Claims For Damages

49. In contrast to the government, Glendale has duly honored and performed its contractual obligations. The merger of Broward with and into Glendale was consummated and effective on November 19, 1981, upon the terms and conditions described above as set forth in the Merger Agreement and the Supervisory Assistance Agreement.

50. Following the merger, Glendale fully and faithfully performed all of its obligations under its contract with the United States. As noted above, Glendale paid FSLIC $18.4 million, as the parties had agreed during negotiations over the effective purchase price for Broward. And Glendale scrupulously and successfully performed its fundamental obligation to operate Broward in a manner that stemmed the $4 million per month losses, and returned Glendale's "Florida Division" to profitability. Today Glendale operates the largest branch network of any thrift in Florida, and Glendale remains strong, healthy and profitable everywhere it operates—including Florida.

51. The government, for its part, has breached its contract with Glendale in ways that go beyond the requirements of FIRREA. In addition to FIRREA's express statutory terms concerning goodwill, which are summarized above, FIRRREA required the Director of OTS to promulgate regulations further elaborating the statute's regulatory capital requirements and directed that they be no less stringent than those applicable to national banks. The Directors' regulatory capital regulations became effective December 7, 1989. OTS expressly acknowledged in the Federal Register that it "arguably has flexibility" to continue to permit goodwill to be counted as an asset at least for certain regulatory capital purposes. Moreover, as OTS also acknowledged in the Federal Register, the analogous regulatory capital requirements applicable to national banks (to which FIRREA expressly refers as a model for OTS) permit goodwill to be grandfathered and thus counted as an asset at least for certain regulatory capital purposes. Nevertheless, the OTS regulations go beyond the requirements of FIRREA and the capital requirements applicable to national banks to disallow the

counting of goodwill as an asset for regulatory capital purposes even in circumstances where OTS acknowledges it has "flexibility"—i.e., discretion—and in which national banks may count goodwill as part of regulatory capital.

52. Failure to meet the new regulatory capital requirements imposed by OTS pursuant to FIRREA has severe and adverse legal, financial and business consequences. Such failure subjects a thrift institution to an extensive range of supervisory and regulatory sanctions available to the regulators of financial institutions. The threat of such regulatory action has consequences far beyond technical questions of legal compliance or non-compliance, and can harm a thrift's business operations in palpable ways.

53. Glendale fully satisfies all of the new regulatory capital requirements imposed by FIRREA and the OTS implementing regulations, even without the disallowed goodwill that the government required Glendale to book, and without which the Broward merger would have been unthinkable for both Glendale and the government. Glendale is so strong that its tangible assets, together with the percentage of its goodwill that FIRREA temporarily does allow Glendale to include as regulatory capital, are enough to satisfy the new legal requirements. But Glendale has nevertheless incurred damages as a result of the government's conduct in enacting FIRREA, and in promulgating implementing regulations that exercise OTS discretion to further disregard the goodwill that the government required and agreed that Glendale could count as an asset for regulatory capital purposes, and in implementing and enforcing the new regulatory capital regime in a manner that denies Glendale the stature, privileges and opportunities to which it is entitled as a strong, well-managed and profitable thrift institution.

54. Glendale's damages also result from the fact that the required deduction of goodwill from capital as shown on its certified financial statements, solely for regulatory capital purposes, brings Glendale closer to the line of regulatory capital compliance than it would be if the government honored its contractual obligations. As a consequence, the Director of OTS, FDIC and other government agencies and officials have denied Glendale valuable benefits and business opportunities that would have been available to Glendale had the government not reneged on its agreement. Glendale has suffered damages as a result.

55. Glendale also has had to sell and readjust certain assets, generally at a cost of over $1 million per month, in order to satisfy or assure continued compliance with the government's new regulatory capital requirements. These costs constitute contract damages that are recoverable in this action.

56. Glendale's claim for damages also rests upon the government's unconstitutional taking of its valuable property rights without just compensation and upon the government's unconstitutional abrogation and retroactive deprivation of those rights without due process. The government's contractual promises, and the now-worthless goodwill, were of significant value to Glendale, and represented settled, justified, investment-backed expectations constituting property rights. Those rights cannot be taken without just compensation and without due process of law.

COUNT I

(Restitution for Breach of Contract)

57. Plaintiff Glendale repeats and realleges here all

allegations set forth in paragraphs 1 through 56 above.

58. As a result of the passage of FIRREA and the promulgation of the OTS regulatory capital regulations, and other conduct abrogating the United States' contractual obligations and promises under the Supervisory Action Agreement, the United States breached fundamental and material terms of its contract with Glendale.

59. Because of this breach, Glendale is entitled to restitution of all benefits it has conferred upon the United States pursuant to the contract, including but not limited to the $18.4 million it paid directly to the United States. Glendale is also entitled to recover the amount by which the United States has been unjustly enriched by other benefits it received from Glendale under the contract.

COUNT II

(Restitution for Frustration of Purpose)

60. Plaintiff Glendale repeats and realleges here all allegations set forth in paragraphs 1 through 59 above.

61. The United States' agreement and requirement that purchase accounting would govern the merger, and that the goodwill Glendale acquired could be used to satisfy regulatory capital standards and be amortized over a period of up to 40 years, was a fundamental element of the parties' agreement. Glendale would not have acquired Broward, and would never have entered into the Supervisory Action Agreement or paid the government $18.4 million pursuant to that agreement, in the absence of

that element. Similarly, the United States would not have approved the merger or entered into the Supervisory Action Agreement without that element.

62. The parties to the transaction could not reasonably have foreseen government conduct that would abrogate that fundamental element of the contract.

63. The abrogation of goodwill as an asset for regulatory capital purposes by FIRREA, by the OTS regualtory capital regulation, and by other government conduct, overturns the basis of the bargain struck by the parties and frustrates its purpose.

64. As a result of this frustration of the purpose of the contract, Glendale is entitled to restitution of all benefits it has conferred upon the United States, including but not limited to the $18.4 million it paid directly to the United States and the value of all other benefits by which the United States has been unjustly enriched.

COUNT III

(Restitution as a Result of Mutual Mistake)

65. Plaintiff Glendale repeats and realleges here all allegations set forth in paragraphs 1 through 64 above.

66. Both parties to the contract assumed that Glendale could count the goodwill it acquired through its merger with Broward as an asset for purposes of satisfying regulatory capital requirements, and that the goodwill could be amortized over a period of up to 40 years.

67. Both parties were mistaken in their assumptions as to these facts which apparently existed at the

time of contracting. These assumptions went to the heart of the contract.

68. Accordingly, as a result of that mutual mistake, Glendale is entitled to restitution of the $18.4 million it paid to the United States, and of such other benefits as the United States received and by which it has been unjustly enriched.

COUNT IV

(Damages for Breach of Contract)

69. Plaintiff Glendale repeats and realleges here all allegations set forth in paragraphs 1 through 68 above.

70. By rescinding its promise to allow Glendale to count the goodwill it acquired through its merger with Broward as part of its capital for regulatory purposes and to amortize the goodwill over 40 years, the United States breached a material term of the contract.

71. As a result of that breach, Glendale has suffered damages including, but not limited to, resulting costs of over $1 million per month.

72. Because of the United States' breach of a material term of its contract with Glendale, Glendale is entitled to damages for that breach.

COUNT V

(Compensation for Taking of Property Rights)

73. Plaintiff Glendale repeats and realleges here all allegations set forth in paragraphs 1 through 72 above.

74. The goodwill that Glendale acquired through its merger with Broward constitutes valuable property under applicable law, for which Glendale paid substantial consideration.

75. By its conduct, the United States has taken this property from Glendale without providing any just compensation in return, in violation of the Fifth Amendment to the United States Constitution.

76. Glendale accordingly is entitled to recover just compensation for the property that the government has unconstitutionally taken.

COUNT VI

(Compensation for Taking of Contract Rights)

77. Plaintiff Glendale repeats and realleges here all allegations set forth in paragraphs 1 through 76 above.

78. The rights the United States conferred upon Glendale pursuant to the contract between the parties—including rights arising from the government's promise and requirement that the goodwill Glendale acquired could be counted and amortized for up to 40 years as regulatory capital—constitute valuable property.

79. The United States has taken those contractual property rights from Glendale, by enacting FIRREA, by promulgating the OTS regulations and by other conduct, but the government has provided Glendale no just compensation in return.

80. Accordingly, the Fifth Amendment to the United States Constitution requires the United States to pay just compensation to Glendale.

COUNT VII

(Damages for Deprivation of Property Without Due Process)

81. Plaintiff Glendale repeats and realleges here all allegations set forth in paragraphs 1 through 80 above.

82. The goodwill and contract rights that Glendale acquired in connection with the Broward merger constitute valuable property rights based upon, among other things, reasonable investment-backed expectations of Glendale.

83. The United States, in FIRREA, in the OTS regulatory capital regulations, and in other ways, has taken this property from Glendale in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution, and Glendale is entitled to recover all damage incurred as a result of this conduct.

COUNT VIII

(Damages for Retroactive Application of Law in Violation of Due Process)

84. Plaintiff Glendale repeats and realleges here all allegations set forth in paragraphs 1 through 83 above.

85. Glendale consummated the merger with Broward, and entered into its contract with the United States, in specific reliance upon the government's promises and requirements set forth in the contract and in prevailing statutes, regulations, and published policies having the full force and effect of law.

86. Application of FIRREA and the OTS capital regulations to deprive Glendale, retroactively, of the right it obtained in 1981 to count goodwill as capital for regulatory purposes for up to 40 years represents unduly harsh and oppressive government conduct that is arbitrary and capricious, and thus violates the Due Process Clause of the Fifth Amendment to the United States Constitution.

87. Glendale is entitled to recover all damages it has incurred as a result of this unconstitutional retroactive application of the law.

PRAYER AND RELIEF

WHEREFORE, Plaintiff Glendale Federal Bank, FSB demands judgment against the United States:

On Count I, for restitution in the amount of not less than $18.4 million, plus interest thereon;

On Count II, for restitution in the amount of not less than $18.4 million, plus interest thereon;

On Count III, for restitution in the amount of not less than $18.4 million, plus interest thereon;

On Count IV, for damages in the amount to be proved by Glendale;

On Count V, for damages in the amount to be proved by Glendale;

On Count VI, for damages in the amount to be proved by Glendale;

On Count VII, for damages in the amount to be proved by Glendale;

On Count VIII, for damages in the amount to be proved by Glendale;

On all Counts, for such other restitutionary, compensatory, declaratory and injunctive relief as this Court may deem just and proper to make

effective the Court's judgment on Glendale's contractual, constitutional, and other claims;

On all Counts, for interest and for such cost, expenses and attorneys' fees as are warranted by law.

Respectfully submitted,

/s/ Paul G. Gaston

Paul G. Gaston
SPRIGGS & HOLLINGSWORTH
1350 I Street, N.W.
Washington, D.C. 20005
(202) 898-5800

Counsel of Record for Plaintiff
Glendale Federal Bank, FSB

Of Counsel:

Jerry Stouck
Daniel M. Press
SPRIGGS & HOLLINGSWORTH
1350 I Street, N.W.
Washington, D.C. 20005
(202) 898-5800

Dated: August 15, 1990

FEDERAL HOME LOAN BANK BOARD
OFFICE OF EXAMINATIONS AND SUPERVISION

MEMORANDUM #R 31b

To: OES Professional Staff September 1, 1981

From: L. David Taylor Goodwill

SYNOPSIS: ACCOUNTING FOR GOODWILL IN ACCORDANCE WITH GAAP IS ACCEPTABLE

(Editor's Note: Memorandum #R31a, dated March 3, 1974 is rescinded)

This memorandum sets forth guidelines for the staff of the Federal Home Loan Bank Board in reviewing the proposed accounting, under generally accepted accounting principles, for goodwill arising in the acquisition of a savings and loan association. This intangible asset generally results when the purchase price for an institution exceeds the fair value of the assets acquired, reduced by the fair value of any liabilities assumed. It only arises when the accounting for a business combination is in accordance with the purchase method. Accounting Principles Board Opinion (APBO) No. 16 contains guidelines for the use of the purchase method of accounting in a business combination.

Accounting for business combinations involving insured institutions should be in accordance with generally accepted accounting principles (GAAP). APBO No. 16 indicates the conditions for using the purchase method of accounting and provides instruction in its application. Financial Accounting Standards Board (FASB) Interpretation No. 9 provides additional guidance when

applying the purchase method in a business combination involving a savings and loan association.

FASB Interpretation No. 9 describes the intangible assets and related accounting that can occur in a business combination involving a savings and loan association. It states that "the purchase price paid for a savings and loan association may include an amount for one or more factors, such as the following:

a) Capacity of existing savings accounts and loan accounts to generate future income,

b) Capacity of existing savings accounts and loan accounts to generate additional business or new business, and

c) Nature of territory served.

If the amount paid for any such factor can be determined, that amount shall not be included in goodwill. Rather, the amount paid for that separately identified intangible shall be recorded as the cost of the intangible and amortized over its estimated life."

The interpretation goes on to state that any portion of the purchase price which cannot be so assigned shall be assigned to goodwill and amortized in accordance with APBO No. 17, "Accounting for Intangible Assets." The interpretation recognizes that in some situations the amount paid for factors such as those described cannot be separately determined and, as a result, their value is included in the amount designated as goodwill.

Identifying the fair value of these or other intangible factors, whether separately identified or included in goodwill, is a subjective task. It can be based on market-

ing and other demographic studies, analysis of the resulting association's abilities to cross sell services, or analysis of past and expected behavior and lives of the acquired association's savings and loan accounts. In addition to determining the value of these intangible assets, such analyses should determine the asset's life and an appropriate amortization method to provide proper matching with the resulting income derived from the accounts. Any assumptions used in determining these amounts must be realistic in light of the resulting association's management philosophies, practices, and abilities.

In discussing the estimated life of intangible assets, APBO No. 17 indicates that "analysis of all factors should result in a reasonable estimate of the useful life of most intangible assets. As reasonable estimate of the useful life may often be based on upper and lower limits, even though a fixed existence is not determinable. The period of amortization should not, however, exceed forty years."

An application from an association requesting approval for a business combination to be accounted for by the purchase method of accounting, from which intangible assets will result, should include a description of any resulting intangible assets and the plan for their amortization. This description should discuss the nature and results of management's analysis of the underlying intangible assets and the resulting amortization periods and methods.

This memorandum does not require a change in the accounting for goodwill from business combinations which have previously been consummated. However, upon obtaining approval of the Principal Supervisory

Agent, an association may change the accounting for goodwill to comply with this memorandum.

/s/
Director

Distribution to state supervisory authorities to be made by District Director-Examinations.

Peat, Marwick, Mitchell & Co.

Certified Public Accountants
555 South Flower Street
Los Angeles, California 90071
(213) 972-4000

November 10, 1981

The Board of Directors
Glendale Federal Savings and Loan Association
Los Angeles, California

Gentlemen:

We have reviewed the proposed accounting for the acquisition of First Federal Savings and Loan Association of Broward County (Broward) by Glendale Federal Savings and Loan Association (GFS) as set forth in the "Proposed Accounting Procedures" section (copy attached) to be included in the filing with the Agreement of Merger and Supervisory Action Agreement.

The acquisition of Broward by GFS is a purchase transaction under generally accepted accounting principles (Accounting Principles Board Opinion No. 16) and accordingly the assets and liabilities will be recorded at fair value.

Any excess of fair value of liabilities over the fair value of assets will be recorded as goodwill and will be amortized in accordance with Accounting Principles Board Opinion No. 17 over its estimated useful life as described in the attached Proposed Accounting Procedures.

In our opinion, the accounting for the acquisition of Broward by GFS, as described in the attached "Proposed Accounting Procedures," is in accordance with generally accepted accounting principles.

Very truly yours,

Peat, Marwick, Mitchell & Co.

Proposed Accounting Procedures

The accounting procedures to be followed by Glendale Federal Savings and Loan Association (GFS) with respect to the acquisition of First Federal Savings and Loan Association of Broward County (Broward) by GFS are as follows:

Pursuant to the provisions of the Agreement of Merger, upon the effective date, GFS will account for the acquisition using the "Purchase Method" of accounting in accordance with Accounting Principles Board Opinion No. 16. Assets and liabilities will be recorded at their respective fair values as of the effective date of acquisition. Any excess of fair value of liabilities over the fair value of assets will be recorded as goodwill.

In accordance with Accounting Principles Board Opinion No. 17, a portion of the resulting goodwill has been associated with the savings deposit base and will be amortized on a straight line basis over 12 years, the estimated life of the savings deposit base. The remaining goodwill will be amortized on a straight line basis over 40 years as GFS believes that this remaining goodwill has an indefinite life since it is related to expansion of operations into an entirely new market area.

Discounts and/or premiums resulting from the valuation to fair value of interest bearing assets and liabilities will be accreted and/or amortized using a level yield interest method over the estimated lives of the respective assets or liabilities.

Any payments to or from the Federal Savings and Loan Insurance Corporation as a result of the Supervisory Action Agreement will be recorded to expense or income in the period in which they accrue.

AGREEMENT OF MERGER

BETWEEN

GLENDALE FEDERAL SAVINGS AND LOAN ASSOCIATION

AND

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BROWARD COUNTY

DATED AS OF NOVEMBER 12, 1981

ARTICLE IV
CONDITIONS TO MERGER

The obligations of Glendale to complete the transactions contemplated by this Merger Agreement are subject to the satisfaction, on or before the Effective Date, of the following conditions:

4.1 *Regulatory Approval.*

The FHLBB shall have approved the transactions contemplated by this Merger Agreement to the extent required by applicable law and regulations without the imposition of any conditions to which Glendale has not agreed.

4.2 *Supervisory Action Agreement.*

The Federal Savings and Loan Insurance Corporation ("FSLIC") shall have entered into a Supervisory Action Agreement with Glendale satisfactory in form and substance to Glendale, and all conditions to the performance by Glendale of its obligations as stated therein shall have been satisfied by FSLIC or FHLBB.

4.3 *Representations and Warranties.*

The representations and warranties of Glendale and the Association set forth in Articles II and III respectively hereof shall, except as contemplated or permitted by this Merger Agreement, be true in all material respects on and as of the Effective Date with the same effect as if made on such date.

Federal Home Loan Bank Board

1700 G Street, N.E.
Washington, D.C. 20552

Federal Home Loan Bank System
Federal Home Loan Mortgage Corporation
Federal Savings and Loan Insurance Corporation

November 16, 1981

Richard Fink, Esq.
McKenna & Fitting
3435 Wilshire Boulevard
Suite 2800
Los Angeles, California 90010

Dear Mr. Fink

I enclose are draft documents concerning your requests for supervisory forbearance in connection with the proposed merger of First Federal Savings and Loan Association of Broward County, Fort Lauderdale, Florida, into Glendale Federal Savings and Loan Association. The documents include the following:

1. Draft forbearance letter to be signed by the Director of OES. This letter covers items one through four of your requests listed in Exhibit B, with the exception of the request for forbearance for failure to meet liquidity requirements. OES felt that Glendale's problems resulting from the merger in meeting liquidity requirements could best be handled on a case by case basis by the Principal Supervisory Agent pursuant to 12 C.F.R. § 523.12(c).

2. Draft letter concerning branch and merger applications to be signed by the Director of OID. This letter is in response to item five of Exhibit B.

3. Letter of November 13, 1981, concerning the filing of the Form AR, signed by D. James Croft, Director of OES. This letter was sent in response to item 8 of Exhibit B.

4. With respect to item six, the request for approval of the use of purchase accounting, the following information, in addition to that contained in the November 10, 1981, letter from Peat, Marwick, Mitchell & Company, is needed for the request to be properly evaluated:

   (a) The amount of the goodwill in dollars and how that amount was derived.

   (b) The amount of the discount (difference between the fair market value of assets and the fair market value of liabilities) in dollars and how it was derived.

   (c) For both goodwill and the discount, the resulting amortization periods and methods.

   (d) The justification under GAAP for the use of the purchase method of accounting.

5. Item seven of Exhibit B is covered by § 11 of the Supervisory Action Agreement which should read:

   11. *Supervisory Restrictions.* Supervisory restrictions imposed by the FSLIC or the FHLBB specifically upon the Association as a corporate entity shall not be imposed upon Glendale, as the Resulting Association and successor to the Association.

Please send the information requested on your purchase accounting request as soon as possible and let me know what you think of the other documents.

Very truly yours,

/s/
Lawrence W. Hayes
Associate General Counsel

GLENDALE FEDERAL SAVINGS

November 17, 1981

Mr. Lawrence R. Hayes
Assistant General Counsel
Federal Home Loan Bank Board
1700 C Street, N.W.
Washington, D.C. 20552

Dear Mr. Hayes

This letter is in response to your letter of November 16, 1981 requesting additional data concerning accounting treatment of the proposed Glendale Federal Savings merger with First Federal of Broward County.

(a) Amount of goodwill and derivation:

The amount of goodwill and discount will be based upon market rates at the date of closing. A preliminary computation based upon market values at August 31, 1981 resulted in the following:

(1) Amount of goodwill: $515,000,000

(2) Derivation: See Exhibit A

(b) Amount of discount of assets and derivation:

(1) Investment securities were priced at market resulting in a discount of $63,000,000.

(2) Loans were discounted to yield 18% with a balloon payment at the end of twelve years (pass-through pricing) resulting in a discount of $791,000,000.

(3) Savings and FHLB advances were adjusted to current market after adjusting maturities on small savers certificates for prepayment experience resulting in a total discount of $35,000,000.

(c) Amortization periods and methods for goodwill and discount of assets:

(1) Approximately $19,000,000 of the goodwill will be amortized over a 12-year period. The balance will be amortized over 40 years.

(2) The discount on investments will be amortized over the life of the applicable securities.

(3) The discount on the loans will be amortized on the level yield method over the life of the loans (approximately 23 years).

(d) Justification for purchase method of accounting:

The purchase method of accounting is the proper one since Glendale Federal is clearly the dominant and continuing entity and will have effective control over the assets and operations of Broward.

Very truly yours,

/s/

/ljs
Attachment

FIRST FEDERAL OF BROWARD
COMPUTATION OF GOODWILL

Investments	$ 63[1]
Loans	791[2]
Savings	(14)[3]
FHLB Advances	(25)[3]
Fixed Assets	(10)[4]
Service Corporation	(10)[4]
Total	$ 795
Tax effect @ 30%	(238)
Net Worth (12/31/81)	(42)
Total Goodwill	$ 515

[1] Current market value of portfolio.

[2] 23 year life with balloon at end of 12 years.

[3] Adjusted to current rates modified for prepayment assumptions.

[4] Current appraised values.

11/18/81

First FS&LA of Broward County

Financial Information Presentation

Liquidation

Liquidation Assumptions

1. Insured Savings	$1,775,850,000
2. Uninsured Savings	113,503,000
3. Number of Insured Accounts	629,088
4. Per Account Insurance Payment Cost	25
5. Receivership Life	1 year
6. FSLIC Opportunity Cost	15.0%
7. Assets as of 9-30-81	2,643,390,000
8. Net Worth as of 9-30-81	56,762,000

Cost of Liquidation	*$ Actual*	*$ PV Discount*
Payout of Insured Savers	(1,775,850,000)	(1,775,850,000)
Insurance Payment Cost	(15,727,000)	(15,727,000)
Total Cash Outflows	(1,791,577,000)	(1,791,577,000)
Recovery from Receivership	1,158,930,000	1,007,770,000
Total Gain (Loss) to FSLIC	$ (632,647,000)	$ (783,807,000)
Uninsured Savings Balance	$39,430,000	

SUPERVISORY ACTION AGREEMENT

This Supervisory Action Agreement, dated November 19, 1981, between the FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a corporate instrumentality and agency of the United States Government (hereinafter the "FSLIC"), and *GLENDALE FEDERAL SAVINGS AND LOAN ASSOCIATION*, a savings and loan association organized in mutual form under the laws of the United States of America located in Glendale, California (hereinafter "Glendale").

RECITALS

A. Glendale is a Federal savings and loan association with its principal office in the State of California, the accounts of which are insured by the FSLIC in accordance with § 403 of the National Housing Act, as amended (hereinafter the "Act").

B. FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BROWARD COUNTY (the "Association") is a Federal savings and loan association organized in mutual form under the laws of the United States of America with its principal office in Fort Lauderdale, Florida, the accounts of which are insured by the FSLIC in accordance with § 403 of the Act.

C. The Association has incurred significant losses and its financial condition is such that remedial action must be taken.

D. The FSLIC has decided, pursuant to § 406(f) of the Act, to provide assistance as set forth in this Agreement, having determined that the Association is in danger of default and that the nature and/or

amount of such assistance would be less than the losses FSLIC would sustain upon the liquidation of the Association through a receivership accompanied by the payment of insurance of accounts.

E. Glendale proposes to enter into an agreement of merger with the Association (hereinafter the "Agreement of Merger") pursuant to which the Association will be merged into Glendale in a tax free reorganization pursuant to Section 368(a)(1)(G) of the Internal Revenue Code of 1954, as amended, with Glendale as the surviving association with its home office located in Glendale, California.

NOW, THEREFORE, the parties agree as follows:

1. *Definitions.*

(a) The term "*Effective Date*" means the day and time on which the merger of the Association into Glendale becomes effective pursuant to the terms of the Agreement of Merger and applicable law.

(b) The term "*FHLBB*" means the Federal Home Loan Bank Board or any successor thereto.

(c) The term "*Insurance Regulations*" means the Rules and Regulations of the Federal Savings and Loan Insurance Corporation, 12 C.F.R. §§ 561-571 (1981).

(d) The term "*Federal Regulations*" means the Rules and Regulations for the Federal Savings and Loan System, 12 C.F.R. §§ 541-556 (1981).

(e) The term "*Unknown Liability*" means any loss, liability, claim, demand, cause of action or judgment against the Association, or Glendale as its successor, or against both the Association and Glendale as its successor, to the extent that any such loss, liability, claim, demand, cause of action or judgment (i) is not reserved for or provision made for its payment on the financial statements of the

Association delivered to Glendale pursuant to the Agreement of Merger, or (ii) is not specifically disclosed in a schedule or exhibit to the Agreement of Merger, or (iii) is attributable to or results from any inaccurate representations of the Association set forth in the Agreement of Merger, *provided*, that such financial statements and schedules or exhibits are supplied to the FSLIC. For the purposes of this definition, "Unknown Liability" includes, but is not limited to, claims based upon the failure of the Association to fund pension and retirement payment obligations of the Association.

2. *Conditions to Obligations of Glendale.* The obligations of Glendale under this Agreement are subject to satisfaction of the following conditions:

(a) The FHLBB shall have approved the amendments to the bylaws of Glendale in the form set forth in Exhibit A hereto.

(b) The merger of the Association into Glendale shall have become effective.

(c) A supervisory forbearance letter in the form set forth in Exhibit B shall have been issued.

(d) A letter on the processing of branch applications in the form set forth in Exhibit C shall have been issued.

(e) A letter making the certification as to the Association specified in Section 368(a)(1)(G) of the Internal Revenue Code of 1954, as amended, in the form set forth in Exhibit D shall have been issued.

3. *Conditions to Obligations of Glendale and FSLIC.* The obligations of the FSLIC and Glendale under this Agreement with respect to the Association are subject to the merger of the Association into Glendale becoming effective, and to the satisfaction of the following conditions:

(a) All court actions, regulatory and agency actions, approvals and consents, and all corporate actions, approvals and consents (including resolutions of directors) necessary to accomplish the merger of the Association and Glendale shall have been obtained or accomplished.

(b) All corporate and other proceedings taken in connection with the transactions contemplated hereby shall be satisfactory in form and substance to Glendale and its counsel and to the FSLIC and its counsel, and Glendale and its counsel shall have received such counterpart originals or certified or other copies of such documents as they may reasonably request.

(c) The FSLIC's obligations hereunder as to the Association are also conditioned upon receipt of the following:

(i) An opinion of counsel for Glendale, in form and substance satisfactory to the FSLIC and its counsel, to the effect that:

(A) The merger of the Association into Glendale has been duly authorized by the directors of Glendale and has been effected in compliance with applicable law; and

(B) This Agreement has been duly executed, and delivered, and constitutes a valid and binding obligation of Glendale.

In rendering the opinion, counsel may rely upon certificates of public officials and of responsible officers of Glendale with regard to factual matters.

(ii) A certified copy of the corporate resolutions of Glendale authorizing the execution and delivery of this Agreement and the Agreement of Merger with the Association.

(iii) A certified copy of the corporate resolutions of the Association authorizing the execution and delivery of the Agreement of Merger with Glendale.

4. *Representations.* Glendale hereby represents and warrants to the FSLIC that this Agreement and the Agreement of Merger have each been duly authorized and each has been or will be duly executed by Glendale. The FSLIC represents and warrants that this Agreement has been duly authorized and executed by it.

5. *Rate Protection.* FSLIC and Glendale agree that the future financial condition of Glendale as merged with the Association could be adversely affected by changes in interest rates and that any such adverse effect would be substantially increased as a result of such merger. In order to minimize such risk to Glendale, and at the same time minimize the cost to FSLIC should future interest rates not endanger Glendale's financial condition, the parties agree that FSLIC will make payments to Glendale or Glendale will make payments to FSLIC based upon the following:

(a) For the purposes of this section the following terms have the following meanings:

(i) *Annual Interest Rate Index* means a rate determined as follows: the average of the coupon equivalent yields (rounded to the nearest .001%) of the 90-day, six-month and two-year maturities of U.S. Treasury bills and notes shall be determined each week from figures reported by the Wall Street Journal with respect to the market closing each Friday (or if a holiday, the previous business day) of each Annual Period; and the sum of the averages shall be divided by the number of Fridays in such Annual period.

(i) *Initial Interest Rate Index* means the average of the coupon equivalent yields of the U.S. government securities specified in the definition of Annual Interest Rate Index determined at the

market closing on the first Friday following the Effective Date.

(iii) *Rate Protection Base* means the following dollar amounts at the following Anniversary Dates:

Anniversary Date	*Rate Protection Base*
1	$1.2 Billion
2	1.2 Billion
3	1.0 Billion
4	800 Million
5	500 Million
6-10	0

(iv) *Anniversary Date* means the date one year after the Effective Date and the same day of each succeeding year.

(v) *Annual Period* means each one year period prior to an Anniversary Date.

(b) The amounts to be paid hereunder, if any, shall be paid within 30 days following each Anniversary Date with respect to the preceding Annual Period and shall be an amount equal to the Rate Protection Base as of such Anniversary Date multiplied by the decimal fraction determined as follows:

(i) Such fraction shall be the difference between the Initial Interest Rate Index and the Annual Interest Rate Index for the prior Annual Period adjusted as provided in (ii) below.

(ii) No payment shall be made for any Annual Period if such difference is 1.00 percent or less. If such difference is in excess of 1.00 percent for any Annual Period, such fraction shall be such difference less 1.00 percent, provided that such fraction after reduction by such 1.00 percent shall not exceed 2.00 percent for any Annual Period.

Such amount shall be paid by FSLIC to Glendale if the Annual Interest Rate Index is greater than the Initial Interest Rate Index and shall be paid by Glendale to FSLIC if the Initial Interest Rate Index is greater than the Annual Interest Rate Index, as computed above.

(c) Notwithstanding (b) above, however,

(i) The amounts due FSLIC shall be reduced in the aggregate by $20 million and no amounts hereunder shall be payable by Glendale except accumulated amounts due to FSLIC pursuant to paragraph (b) that exceed such $20 million.

(ii) Glendale may request a deferral of payment for any Annual Period if the consolidated net worth of Glendale as of the end of the month immediately preceding the Anniversary Date following such Annual Period is less than 2.5% of Glendale's total consolidated assets, all computed in accordance with generally accepted accounting principles; and the FSLIC shall not unreasonably refuse such request, *provided* that interest shall accumulate on any deferred payment at a rate equal to the six month Treasury bill rate in effect as of the relevant Anniversary Date.

All tax benefits, if any, inuring to Glendale as a result of the merger of the Association with and into Glendale, or as a result of payments hereunder, or as a result of any other provision of this Agreement, shall inure to the benefit of Glendale and shall not reduce amounts otherwise payable by FSLIC to Glendale hereunder.

6. *Indemnification.* The FSLIC agrees to indemnify and hold harmless Glendale for:

(a) damages arising out of litigation brought against Glendale in the name of the Association,

or by former directors, officers or depositors of the Association, or based upon any action taken by the FHLBB or the FSLIC or a conservator or a receiver appointed by the FHLBB to effect the merger or the transactions contemplated by this Agreement; and

(b) all amounts paid by Glendale in satisfaction, settlement, or compromise of any Unknown Liability, net of any amounts paid to Glendale to offset an amount paid by Glendale pursuant to a related claim of the Association or Glendale as its successor, if such offset or related claim is not reflected on the books of the Association,

including all reasonable costs and attorneys' fees incident to the defense thereof, whether now pending or hereafter claimed or arising; *provided*, however, that before entering into any binding commitment with respect to any litigation referred to in clause (a) of this Section or any Unknown Liability, or making any payment in connection therewith, Glendale must observe covenants set forth in this Agreement relating to the handling of claims, demands, causes of action, lawsuits or judgments.

7. *Covenants by Glendale.* Glendale agrees that during the term of this Agreement:

(a) Glendale will keep such books and records as FSLIC shall reasonably require and/or need to identify and verify the calculations required by this Agreement.

(b) Glendale will exercise its best efforts to administer and deal with Unknown Liabilities in the best interest of both Glendale and the FSLIC and will make every effort to minimize losses.

(c) With respect to all claims, demands, causes of action, lawsuits, or judgments with respect to which

the FSLIC agrees to indemnify and hold harmless Glendale pursuant to Paragraph 6 above, Glendale shall:

(i) Keep the FSLIC informed of the status of such matters;

(ii) Observe the rights of the FSLIC to monitor and direct the defense of such matters, including the right to direct Glendale to appeal any determination of any court, *provided* that the cost of monitoring and directing the defense or prosecution shall be borne by the FSLIC;

(iii) Authorize the FSLIC, upon the FSLIC's election and at the FSLIC's expense with its own attorneys, to defend in the name of Glendale, the Association, or the FSLIC, as the case may be, any such claim, demand, cause of action, or lawsuit and cooperate fully with the FSLIC in the defense or prosecution of any such action including, but not limited to, the furnishing to the FSLIC of all books and records applicable thereto in the possession of Glendale or any affiliate thereof;

(iv) At the request of the FSLIC, assign to the FSLIC and subrogate the FSLIC to any right, title, or interest of Glendale in such claims, demands, causes of action, lawsuits, judgments or defenses thereto; and

(v) Obtain the written consent of the FSLIC before entering into any binding commitment with respect to the satisfaction, settlement, or compromise of any claim, demand, cause of action, or judgment resulting in a payment in excess of $50,000 or before making any such payment in connection therewith, unless such payment is made pursuant to an adjudication by a court of competent jurisdiction which, with the permission of the FSLIC, Glendale has not appealed.

8. *Agreement to Provide Advances.*

(a) The FSLIC shall arrange for the benefit of Glendale or itself make available to Glendale:

(i) Within 90 days after the Effective Date of the merger of Glendale with the Association, to the extent requested by Glendale, the extension, restructuring or refinancing of the entire aggregate principal amount of the balances outstanding as of the Effective Date of the merger under all promissory notes evidencing advances made by the Federal Home Loan Bank of Atlanta ("the FHLB of Atlanta") to the Association ("Outstanding Bank Advances"). The extension, refinancing or restructuring of the Outstanding Bank Advances may be made by the FHLB of Atlanta, by the Federal Home Loan Bank of San Francisco (the "FHLB of San Francisco") or by the FSLIC and shall be in conformity with any credit program then offered to creditworthy members by the FHLB of Atlanta or the FHLB of San Francisco, as the case may be. In lieu of requesting any such extension, refinancing or restructuring, Glendale shall have the right to (a) prepay without prepayment charge or penalty all or any part of the Outstanding Bank Advances, or (b) assume any part of the Outstanding Bank Advances not prepaid, extended, restructured or refinanced, in accordance with the existing terms and conditions thereof. If the FHLB of Atlanta shall impose upon Glendale any prepayment charge or penalty as a result of prepaying all or any part of the Outstanding Bank Advances, or if the FHLB of Atlanta shall refuse to permit Glendale to assume any part of the Outstanding Bank Advances, then, the FSLIC shall reimburse Glendale for any such charge or penalty or shall make available to Glendale an advance on terms and conditions comparable to the Outstanding Bank Advances not

assumed. Following the 90 day period, Glendale shall not prepay any advance of FHLB of Atlanta and replace such advance with an advance from the FHLB of San Francisco bearing a lower rate of interest than the advance repaid.

(ii) Advances shall be made to Glendale in accordance with the terms of all pending and outstanding commitments to make advances to the Association made by the FHLB of Atlanta. After the Effective Date of the merger and in response to Glendale's further requests for advances, advances shall be made on the same terms as are available to other borrowers of a Federal Home Loan Bank, fairly and impartially and without discrimination (including, *inter alia* no adverse underwriting or credit treatment by virtue of Glendale operating in more than one bank district) in favor of or against any member of the respective Bank, to the extent that such advances may safely and reasonably be made, with due regard for the claims and demands of other institutions and with due regard to the maintenance of adequate credit standing for the Banks and their obligations. It is understood that, for purposes of this paragraph, during the term of this Agreement Glendale shall not be discriminated against in the making of advances because of any adverse effect of the assets and liabilities acquired by Glendale from the Association.

(b) So long as advances from the FHLB of Atlanta are outstanding, Glendale shall buy or maintain the stock of the FHLB of Atlanta, or shall maintain a deposit with such Bank in an amount equal to the stock requirements which would be required by such Bank for borrowings by other savings and loan associations for the amount of such outstanding advances. The stock or deposit requirement imposed

upon Glendale by the previous sentence may be met by the acquisition by Glendale of stock of, or a deposit in, the FHLB of San Francisco in the amount required by the previous sentence and by the maintenance of a corresponding deposit in the FHLB of Atlanta by the FHLB of San Francisco. Any such deposit required of Glendale shall bear interest at a rate not less than the dividend rate paid by such Bank on its stock. In addition, Glendale shall also provide the FHLB of Atlanta adequate collateral for such advances, and shall continue to provide the FHLB of San Francisco adequate collateral for advances the FHLB of San Francisco provides pursuant to the conditions and terms of that Bank. Collateral provided to the FHLB of Atlanta for any advance made directly by that Bank or made indirectly through any other Bank and purchased by the FHLB of Atlanta shall be properly earmarked, segregated, perfected, or recorded consistent with the customary requirements of that Bank applicable to all member and non-member borrowers of the Bank.

9. *Termination.* This Agreement shall terminate and the obligations of the FSLIC to make any payments hereunder shall cease upon the expiration of 10 years from the Effective Date, provided, however, that this Agreement and all obligations of the FSLIC hereunder shall terminate effective upon the appointment of a receiver or other official for the purpose of liquidating Glendale or upon termination of the status of Glendale, or a successor institution, as an institution the accounts of which are insured by the FSLIC or a successor thereof.

10. *Miscellaneous Provisions.*

(a) This Agreement, together with an interpretation thereof or understanding agreed to in writing by

the parties, constitutes the entire agreement between the parties thereto and supersedes all prior agreements and understandings of the parties in connection herewith, excepting only the Agreement of Merger and any resolutions or letters issued contemporaneously herewith by the FHLBB or the FSLIC, *provided*, however, that in the event of any conflict, variance, or inconsistency between this Agreement and the Agreement of Merger, the provisions of this Agreement shall govern and be binding on all parties insofar as the rights, privileges, duties, obligations, and liabilities of the FSLIC are concerned. No modification of this Agreement shall be binding unless executed in writing by the parties hereto or their successors. Section headings are not to be considered part of this Agreement, are solely for convenience of reference, and shall not affect the meaning or interpretation of this Agreement or any provision hereof.

(b) The rights, powers, and remedies given to the parties by this Agreement shall be in addition to all rights, powers, and remedies given by any applicable statute or rule of law. Any failure or delay by any party hereto in exercising or partially exercising any right, power, or remedy, shall not preclude the further exercise thereof.

(c) This Agreement shall be binding upon and inure to the benefit of the parties and their respective successors, transferees and assigns; *provided*, however, that no rights inuring to the benefit of the Association or its successors may be assigned without the consent of the FSLIC except the assignments by operation of law to Glendale pursuant to the merger contemplated hereby. Any other purported assignment shall be void, shall terminate all obligations of the FSLIC hereunder, and shall obligate the assignor

to repay to the FSLIC all contributions theretofore made.

(d) No subsequent modification or termination of this Agreement shall be binding unless set forth in writing and executed by all the parties or their proper successors.

(e) Nothing expressed or referred to herein is intended or shall be construed to give any person other than the FSLIC, or Glendale, any legal or equitable right, remedy, or claim under or in respect to this Agreement, or any provisions herein contained, it being the intention of the parties hereto that this Agreement and all conditions and provisions hereof are for the sole benefit of the FSLIC and Glendale, and for the benefit of no other person.

11. *Supervisory Restrictions.* Supervisory restrictions imposed by the FSLIC or the FHLBB specifically upon the Association as a corporate entity shall not be imposed upon Glendale, as the Resulting Association and successor to the Association.

12. *Governing Law.* This Agreement and the rights and obligations of the parties hereunder shall be governed by the law of the State of California to the extent that Federal law does not control. Nothing in this Agreement shall require any unlawful action or inaction by either of the parties hereto.

13. *Counterparts.* This Agreement may be executed in any number of counterparts, each of which shall constitute one of the same instrument, and any party hereto may execute this Agreement by signing any such counterpart.

14. *Notices.*

(a) Any notice or other communication required or permitted hereunder, unless otherwise specifically

provided for, shall be deemed to be given if sent by first class mail, postage prepaid, to such party at its address set forth below or at such other address as such party shall hereafter furnish in writing.

GLENDALE FEDERAL SAVINGS AND LOAN ASSOCIATION
Attention: President
401 North Brand Boulevard
Glendale, California 91209

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION
Attention: Chief, Financial Assistance Division
1700 G Street, N.W.
Washington, D.C. 20552

(b) Unless otherwise specifically provided for, if this Agreement requires that notice be given within a certain period of time, notice shall be deemed given when deposited with the U.S. Postal Service, or if personally delivered, at the time of receipt.

IN WITNESS WHEREOF, this Agreement is executed by the parties hereto by their officers duly authorized on the date first above written.

GLENDALE FEDERAL SAVINGS AND LOAN ASSOCIATION

By _____ By _____
Secretary Chairman of the Board

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

By _____ By _____
Secretary Director

Federal Home Loan Bank Board

November 19, 1981

President
Glendale Federal Savings
and Loan Association
401 North Brand Boulevard
Glendale, California 91203

Dear Sir:

This letter is issued in connection with the approval by the Federal Home Loan Bank Board ("Board") of the supervisory merger of First Federal Savings and Loan Association of Broward County, Fort Lauderdale, Florida ("Broward") into Glendale Federal Savings and Loan Association, Glendale, California ("Glendale"). In its approval of that merger the Board has determined to exercise supervisory forbearance with respect to certain of the Board's regulatory requirements applicable to Glendale following the merger. In approving the issuance of this letter, the Board has also authorized the Director, Office of Examinations and Supervision ("OES") to exercise that forbearance in such manner as, in his discretion, he deems appropriate. In that regard, in determining whether to take supervisory action, OES will proceed as follows:

1. Following the merger, OES will forbear from exercising its authority under § 563.13(d) and § 563.14(b) of the Rules and Regulations for the Federal Savings and Loan Insurance Corporation because of the failure of Glendale to comply with the statutory reserve and net worth requirements of § 563.13 to the extent that such failure results from

(a) scheduled items attributable to assets of Broward existing at the effective date of the merger, or (b) any reduction in net worth resulting from losses on assets acquired in connection with the merger ("losses of Broward").

2. Following the effective date of the merger, for purposes of compliance with any section of the Rules and Regulations for Insurance of Accounts and the Rules and Regulations for the Federal Savings and Loan System: (a) scheduled items attributable to Broward shall be excluded from the computation of ratios of scheduled items to specified assets in determining whether Glendale meets the requirements of those regulatory provisions referring to such ratios and (b) where reference is made to "net worth," losses of Broward shall be excluded from the net worth of Glendale in determining whether it meets the requirements of those sections.

3. Glendale will not be deemed in noncompliance with the provisions of § 545.9-1 of the Rules and Regulations for the Federal Savings and Loan System solely because activities of any service corporation acquired by a subsidiary of Glendale in connection with the merger are not approved under that section, *provided* those activities could be approved under the Home Owners' Loan Act of 1933 as authorized investments.

4. In determining Glendale's compliance with § 545.9-1(d) of the Rules and Regulations for the Federal Savings and Loan System, the value of any service corporation of Broward acquired by a subsidiary of Glendale in connection with the merger shall not be deemed an investment by Glendale in that subsidiary.

5. For a period of one year following effective date of merger, in determining whether penalty shall be

assessed against or paid by Glendale pursuant to § 523.13 of the Rules and Regulations for Federal Home Loan Bank System, the liquidity requirements of § 523.11 as applied to Glendale shall be reduced by (a) the amount of Broward's liquidity deficiencies existing at the effective date of the merger, and (b) any aggregate net withdrawals (excess of withdrawable over cash savings received) from the Broward division of Glendale after effective date of merger.

By the Federal Home Loan Bank Board

J.J. Finn
Secretary

Federal Home Loan Bank Board

No. 81-710

Date: November 19, 1981

WHEREAS, the boards of directors of First Federal Savings and Loan Association of Broward County, Fort Lauderdale, Florida ("Broward"), and Glendale Federal Savings and Loan Association, Glendale, California ("Glendale"), have adopted an Agreement of Merger (a copy of which is in the Minute Exhibit File) under which Glendale will be the "Resulting Association"; and

WHEREAS, Broward and Glendale have applied to the Federal Home Loan Bank Board ("Bank Board") for approval of said merger, and Glendale has applied to the Federal Savings and Loan Insurance Corporation ("FSLIC") for approval of an increase in its accounts of an insurable type as part of such merger with Broward; and

WHEREAS, the merger of Glendale and Broward is conditioned upon the execution of a Supervisory Action Agreement between Glendale and the FSLIC, under which the FSLIC will agree to provide assistance and to indemnify Glendale for certain losses it may incur as a result of the proposed merger; and

WHEREAS, the proposed merger and execution of a Supervisory Action Agreement ("SAA") with Glendale would be undertaken pursuant to an action by the FSLIC to prevent the failure of Broward; and

WHEREAS, the Bank Board has considered a proposed form of such SAA, pursuant to which

assistance would be provided (a copy of which proposed form of SAA is in the Minute Exhibit file):

NOW THEREFORE, IT IS RESOLVED that the proposed merger of Broward and Glendale and the resulting increase of accounts of an insurable type in Glendale pursuant to the Agreement of Merger are hereby approved pursuant to the provisions of § 546.2 of the Rules and Regulations for the Federal Savings and Loan System ("Federal Regulations") (12 C.F.R. § 546.2 (1981)), and § 563.22 of the Rules and Regulations for the Federal Savings and Loan Insurance Corporation ("Insurance Regulations") (12 C.F.R. § 563.22 (1981)), *provided*, that:

(1) If Glendale elects to average its account balances for the purposes of determining its reserve requirements under § 563.13 of the Insurance Regulations (12 C.F.R. § 563.13 (1981)) at any closing date following the merger, Glendale shall include the appropriate balances of both Glendale and Broward for each closing date used in its calculation;

(2) Not later than sixty days following the effective date of the merger, unless such date is extended by the Principal Supervisory Agent of the Bank Board, San Francisco, California, or an agent of the Bank Board designated by the Principal Supervisory Agent ("Supervisory Agent"), Glendale shall submit evidence to the FSLIC or an agent thereof that Glendale has given notice in writing, in a form approved by the Office of the General Counsel, to each accountholder who had accounts in both Glendale and Broward prior to the merger and the total of

whose withdrawable accounts in the Resulting Association will exceed the sum of $100,000 after the merger, of the effect of the merger on the extent of such accountholder's insurance coverage, *provided*, that any such accountholder is hereby authorized to withdraw without penalty that portion of his accounts in the Resulting Association that is uninsured solely as a result of the merger;

(3) Not later than sixty days following the effective date of the merger, Glendale shall furnish an opinion from its independent accountant, satisfactory to the Supervisory Agent, which (a) indicates the justification under generally accepted accounting principles for use of the purchase method of accounting for its merger with Broward, (b) specifically describes, as of the Effective Date, any goodwill or discount of assets arising from the merger to be recorded on Glendale's books, and (c) substantiates the reasonableness of amounts attributed to goodwill and the discount of assets and the resulting amortization periods and methods; and

(4) Glendale shall submit a stipulation that any goodwill arising from this transaction shall be determined and amortized in accordance with FHLBB Memorandum R-31b; and

RESOLVED FURTHER, that the Bank Board finds that the merger of Glendale and Broward is instituted for supervisory reasons; and

RESOLVED FURTHER, that the Bank Board finds that approval of the merger of Glendale and Broward

is necessary to prevent the probable failure of Broward; and

RESOLVED FURTHER, that the Bank Board, as the operating head of the FSLIC, hereby determines, pursuant to § 406(f) of the National Housing Act, as amended (12 U.S.C. § 1729(f) (Supp. III 1979)), that (1) financial assistance by the FSLIC is necessary to prevent the default of Broward, and (2) the amount of such assistance, to be provided in accordance with the terms and conditions of the proposed SAA by and between Glendale and the FSLIC, would not exceed the amount that would be reasonably necessary to save the cost of liquidating Broward through a receivership accompanied by the payment of insurance on its accounts; and

RESOLVED FURTHER, that the Director, Deputy Director, or Chief, Problem and Rehabilitation Division, Office of the FSLIC ("Director"), or such person as any of them may designate in writing, be and hereby is authorized to execute on behalf of the FSLIC an SAA in the form or substantially in the form of the proposed SAA; and

RESOLVED FURTHER, that the Bank Board finds and hereby certifies that, with respect to Broward, the grounds set forth in 12 U.S.C. § 1464(d)(6)(A)(i) will exist in the near future in the absence of action by the Bank Board; and

RESOLVED FURTHER, that the Secretary or an Assistant Secretary of the Bank Board is hereby authorized and directed to send a letter to Glendale certifying on behalf of the Bank Board that the grounds set forth in 12 U.S.C. § 1464(d)(6)(A)(i) will exist with respect to Broward in the near future in

the absence of Bank Board action, and the Secretary or an Assistant Secretary of the Bank Board is hereby authorized to provide a copy of such certification to any agency of the United States upon request; and

RESOLVED FURTHER, that the Bank Board hereby determines, pursuant to § 556.5(a)(3)(ii)(a) of the Federal Regulations that (1) establishment of former offices of Broward as branch offices of Glendale in Florida as a result of the proposed acquisition will be achieved by a merger pursuant to an action by the FSLIC to prevent the failure of Broward; (2) the insurance liability or risk of the FSLIC will be reduced as a result of the maintenance of such branch offices by Glendale; and (3) no equally desirable acquisition alternative that could be approved in accordance with § 556.5(a)(3)(i) of the Federal Regulations has been submitted with respect to Broward; and

RESOLVED FURTHER, that the maintenance of the offices of Broward, as reflected on the Bank Board's records as of the effective date of the merger, as offices of Glendale subsequent to the merger, is hereby approved; and

RESOLVED FURTHER, that Glendale may designate its offices located in the State of Florida as "First Federal Savings and Loan of Broward County, a division of Glendale Federal Savings and Loan Association"; and

RESOLVED FURTHER, that it is hereby directed that the cessation of the membership of Broward in the Federal Home Loan Bank of Atlanta be noted by reason of the merger hereinbefore approved, effective as of the effective date of the merger; and

RESOLVED FURTHER, that the Secretary or an Assistant Secretary of the Bank Board is hereby directed to cancel Broward's certificate of insurance upon the effective date of the merger; and

RESOLVED FURTHER, that the Secretary or an Assistant Secretary is authorized and directed to send to Glendale a letter concerning scheduled items attributable to Broward and the forbearance of the FSLIC and the Bank Board with respect to certain regulatory requirements (a copy of which letter is in the Minute Exhibit file); and

RESOLVED FURTHER, that amendments to the bylaws of Glendale contained in Exhibit A to the Proposed SAA hereinbefore approved, amending sections four ("Meetings of the board of directors"), fifteen ("Number of directors"), and twenty-two ("Indemnification") are hereby approved; and

RESOLVED FURTHER, that the effective date of the merger of Broward into Glendale shall be 11:59 p.m., EST, November 19, 1981, unless such effective date is altered by the Supervisory Agent.

By the Federal Home Loan Bank Board

J.J. Finn
Secretary

Federal Home Loan Bank Board

No. 81-712

Date: November 19, 1981

WHEREAS, the Director, Deputy Director, or Chief, Problem and Rehabilitation Division, Office of the Federal Savings and Loan Insurance Corporation, or such person as any of them may designate in writing ("Director"), has been authorized to execute on behalf of the Federal Savings and Loan Insurance Corporation ("FSLIC") a Supervisory Action Agreement with Glendale Federal Savings and Loan Association, Glendale, California; and

WHEREAS, said Supervisory Action Agreement imposes certain rights, duties, and obligations upon the FSLIC that do not require basic determinations of policy; and

WHEREAS, in the administration of said Supervisory Action Agreement, and of any rights or obligations acquired by the FSLIC thereunder, it may be necessary or desirable that the FSLIC contract for legal, auditing, and other services:

NOW, THEREFORE, IT IS RESOLVED that the Federal Home Loan Bank Board, as operating head of the FSLIC, has determined that such expenditures of the FSLIC pursuant to said Supervisory Action Agreement shall be incurred, allowed, and paid under the provisions of the fourth sentence of section 402(c)(5) of the National Housing Act, as amended; and

RESOLVED FURTHER, that effective upon the execution of said Supervisory Action Agreement, the

Director is hereby authorized and directed to take such actions as may be desirable or necessary to fulfill the rights, duties, and obligations of the FSLIC under said Supervisory Action Agreement, and to incur, allow, and pay all expenditures in fulfillment of such rights, duties, and obligations, pursuant to the fourth sentence of section 402(c)(5) of the National Housing Act, as amended, including, but not limited to:

1. The payment of amounts required by said Supervisory Action Agreement;
2. Contracting for legal, auditing, or other services; and
3. The pursuit of claims.

By the Federal Home Loan Bank Board

J.J. Finn
Secretary

TRANSCRIPT OF CLIENT-FURNISHED TAPES
November 19, 1981

ANN RILEY & ASSOCIATES, LTD.
72 K Street NW, Suite 300
Washington, D.C.
(202) 293-3950

The following are excerpts from a transcript prepared by the government of a tape recording of a meeting of the Federal Home Loan Bank Board held November 19, 1981. Bracketed page numbers are to the Court of Appeals Appendix:

[1637]

FINN: This is a First Federal Savings and Loan—on FSLIC assisted acquisition by Glendale Federal Savings and Loan of Glendale, California.

* * *

BEESLEY: Mr. Chairman, Board Member DiPrete, you have before you a proposal to merge Broward—First Federal Savings and Loan of Broward County into Glendale Federal Savings and Loan of Glendale, California.

The merger is a negotiated merger between the parties and involves an assistance package of the FSLIC that has never been used, to our knowledge, before.

By way of background, the FSLIC has attempted to strike a merger of this Association, which is a Category 1 problem Association, with the viable Associations existing presently in the State of Florida. They have been contacted and asked if they would be interested in taking this Association, and the answer was negative.

I might say that even the two largest remaining Associations in Florida, if they were to have agreed to

accept Broward on the same terms as has been proposed by Glendale, there would be a serious question as to their viability in the future.
[1638]

Nevertheless, both Associations, AmeriFirst and Florida Federal, have indicated that they would not be interested in this Association on these terms.

The major elements of this proposal involve the use of purchase accounting and an FSLIC guarantee.

* * *

[1639]

* * *

[BEESLEY:] May I make the point to the Board that I was present during some of the discussions between AmeriFirst and Florida Federal with Mr. Connell, and the proposal, as about to be presented to the Board, involving Glendale itself, was presented to them, and they were not interested on those terms, either.

Back to the major elements of the agreement, the use of purchase accounting, with regard to this question, the transaction has been reviewed by Peat, Marwick & Mitchell, Glendale's accounting firm, and they have stated, in a letter dated November 10th, that, in their opinion, the accounting of the acquisition of Broward by Glendale, as described in proposed accounting procedures, is in accordance with generally-accepted accounting principles, and there is a detailed analysis of their conclusions on page 4 of the presentation to the Board.

* * *

[1643]

* * *

[BEESLEY:] I might say, at the outset, in my judgment, I don't think we'll ever see a deal like this one again in terms of its benefit to the FSLIC, and I'd like to turn now to that point.

On the top of page 6, the estimated present value cost to the FSLIC for a liquidation of Broward would be $780 million with an initial cash outlay of $1.8 billion.

Based on the historical cost of dealing with problems using, say, a 30-percent cost of liquidation, we would be looking at approximately a quarter of a billion dollars in assistance if this were solved along the lines of the more traditional means.

This merger, in a worst-case scenario, is going to cost us about $66 million, and in a favorable scenario, we would make about $40 million.
[1644]

* * *

* * * It's an incredible opportunity for the FSLIC and the Bank Board to show how a large problem can be resolved with minimal expense and should build a great deal of confidence in the industry.

* * *

I have seen the spreadsheets over a 20-year period, as prepared by Kaplan & Smith and Peat Marwick, and based on the interest rates at the time, which have improved some since the date those presentations were made, they were, indeed, viable after this merger, and the insurance protection that has been negotiated should protect them from an adverse change in interest rates.

* * *

[1648]

* * *

PRATT: I understand that purchase accounting will be used in this transaction, and in view of the Board's recent discussion of supporting purchase accounting and yet indicating that it should be used in appropriate circumstances, I take it you feel that this merger meets those conditions.

CROFT: Yes, it does.

OES recommends that the Board approve this merger and the use of purchase accounting in the transaction. In our opinion and the opinion of the Chief Accountant's section, this application represents an appropriate use of this technique, and there is nothing in the application that causes us any problems or hesitation whatsoever.

* * *

[1650]

* * *

DIPRETE: Mr. Chairman, do you have any opinion on whether the proposal to amortize the remaining good will, over and about $19 million, over a period as long as 40 years—and I realize that 40 years is considered by accountants to be the maximum period of amortization, but do you have an opinion, yourself, as to whether that figure will be appropriate in every case?

CROFT: My accounting staff indicates that it is probably not appropriate in every case. In this case, they feel that this definitely complies with GAAP, and they would have no objections to this.

* * *

[1651]

BEGIN TAPE 2, SIDE A:

DIPRETE: I take it from your early review that you did make an effort to exhaust the possibility of a

Florida intrastate solution to this problem, and finding none, then undertook an evaluation of Glendale, independent?

BEESLEY: That is correct. And then, upon reaching the agreement with Glendale, Mr. DiPrete, we went back once again, in an abundance of caution, to the two Florida associations, that, in the opinion of supervision, could possibly handle this problem, and disclosed the terms and conditions of the Glendale agreement asked them if, under those terms and conditions, they could possibly have any interest. And we received a positive, we received an actual response in each case saying that they would not.

[1656]

* * *

* * *

[PRATT:] *** Further, that the solution which FSLIC has found is one which appears to save the people of the United States, through a savings to the FSLIC, very substantial sums of money, approximating three quarters of a billion dollars, and that a transaction of this type, therefore, represents the accomplishment of the highest public duty by staff. And I believe that that is important to be noted on the record.

* * *

GLENDALE FEDERAL SAVINGS

March 19, 1982

Milton Feinerman, President
Federal Home Loan Bank of San Francisco
600 California Street
P.O. Box 7948
San Francisco, California 94120

Dear Doctor Feinerman:

In accordance with Federal Home Loan Bank Board Resolution 81-710, date November 19, 1981, which approved the merger of Glendale Federal Savings and Loan Association and First Federal Savings and Loan Association of Broward County, enclosed is an opinion from our independent accountants, Peat, Marwick, Mitchell & Co., with respect to the purchase method of accounting used by Glendale Federal Savings in connection with the merger.

We will be happy to answer any questions you may have concerning the attached material.

Very truly yours,

/s/ David T. Hansen

/ljs
Enclosure

cc: Anthony J. Starinieri
FSLIC

Certified Public Accountants
Peat, Marwick, Mitchell & Co.
555 South Flower Street
Los Angeles, California 90071
(213) 972-4000

The Board of Directors
Glendale Federal Savings and Loan Association

Gentlemen:

We have reviewed the accounting and methodology for the acquisition of First Federal Savings and Loan Association of Broward County (Broward) by Glendale Federal Savings and Loan Association (GFS) as set forth in the accompanying unaudited "Statement of Assets Acquired and Liabilities Assumed of First Federal Savings and Loan Association of Broward County" at November 20, 1981 (Statement).

Management of GFS has recorded the acquisition of Broward as a purchase transaction under generally accepted accounting principles (Accounting Principles Board Opinion No. 16) and accordingly the assets and liabilities have been recorded at fair value. The excess of fair value of liabilities over the fair value of assets has been recorded as goodwill, aggregating $734,666,000 at November 20, 1981, and will be amortized in accordance with Accounting Principles Board Opinion No. 17 over its estimated useful life as described in the note to the Statement. The amount of discount relating to loans receivable as of the acquisition date is $796,418,000 and will be amortized using a level yield interest method over the remaining contractual life of the loan portfolio adjusted for estimated prepayments. Such method results in the recognition of interest income in future periods to

approximately a constant rate of return on the loans. All other discounts and/or premiums resulting from the valuation to fair value of interest bearing assets and liabilities has been amortized using a level yield interest method over the estimated lives of the respective assets or liabilities.

In our opinion, the accounting for the acquisition of Broward by GFS as a purchase transaction is in accordance with generally accepted accounting principles. Additionally, we [illegible] the methodology to compute goodwill, loan discount and other discounts and/or premiums and the related methods and periods for their amortization as described in the note to the Statement and are of the opinion that such methodology is in accordance with generally accepted accounting principles.

Very truly yours,

/s/ Peat, Marwick, Mitchell & Co.

March 15, 1982

STATEMENT OF ASSETS ACQUIRED AND LIABILITIES ASSUMED OF FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BROWARD COUNTY NOVEMBER 20, 1981

Note
(Unaudited)

	Book Balance November 20, 1981	*Purchase Adjustments*	*Fair Value November 20, 1981*
	(Amounts in Thousands)		
Assets:			
Cash	$25,956	$	$25,956
Certificates of deposit, bankers' acceptances and short-term bank obligations	55,358	(334)	55,024
U.S. Government and other securities	96,482	(7,132)	89,350
Loans receivable	2,324,995	(796,418)	1,528,577
Real estate held for sale or development	19,009	(206)	18,803
Interest receivable and other assets	28,673	(797)	27,876
Investment in capital stock of Federal Home Loan Bank	21,196		21,196
Federal Savings and Loan Insurance Corporation secondary reserve	1,193		1,193
Premises and equipment	48,442	7,993	56,435
Goodwill		734,666	732,321
	$2,621,304	$(62,228)	$2,559,076

LIABILITIES:			
Savings accounts	$1,879,845	$(1,767)	$1,878,078
Borrowing from Federal Home Bank	413,220	(7,157)	406,063
Other borrowings	162,930	25	162,955
Other liabilities and accrued expenses	76,807	(311)	76,496
Taxes on income	5,082	(5,082)	
Undisbursed loan funds	35,484		35,484
Deferred income	5,658	(5,658)	
Retained Earnings	42,278	(42,278)	
	$2,623,649	$(62,228)	$2,539,076

See accompanying note.

GLENDALE FEDERAL SAVINGS AND LOAN ASSOCIATION NOTES TO STATEMENT OF ASSETS ACQUIRED AND LIABILITIES ASSUMED OF FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BROWARD COUNTY

NOVEMBER 20, 1981

(Unaudited)

Note *Accounting for the Acquisition*

The generally accepted accounting principles followed by Glendale Federal Savings and Loan Association (GFS) with respect to the acquisition of First Federal Savings and Loan Association of Broward County (Broward) by GFS are as follows:

Pursuant to the provisions of the Agreement of Merger between GFS and Broward dated November 20, 1981 and the Supervisory Action Agreement between GFS and the Federal Savings and Loan Insurance Corporation (FSLIC) dated November 20, 1981, upon the effective date of November 20, 1981, GFS accounted for the acquisition using the "Purchase Method" of accounting in accordance with Accounting Principles Board Opinion No. 16 (APBO 16). Purchase accounting was appropriate inasmuch as Broward was not autonomous within the meaning of APBO 16 before the combination because Broward had incurred significant losses and its financial condition was such that remedial supervisory action was required. FSLIC acted on behalf of Broward and provided substantial assistance to GFS in the form of interest rate protection and other guarantees. In its business and economic analysis GFS has justified its investment in Broward by the future growth potential in the market areas within the state of Florida

and GFS's ability to reach those markets through use of its marketing methods.

- Assets and liabilities have been recorded at their respective fair values as of the effective date of the acquisition in accordance with Accounting Principles Board Opinion No. 16. The excess of fair value of liabilities over the fair value of assets has been recorded as goodwill.

In accordance with Accounting Principles Board Opinion No. 17, $18,000,000 of the resultant goodwill is associated with the savings deposit base and will be amortized on a straight line basis over 12 years, the estimated life of the savings deposit base. The remaining goodwill of $716,666,000 will be amortized on a straight line basis over 40 years as GFS believes that the remaining goodwill has an indefinite life since it is related to expansion of operations into an entirely new market area.

The loan discount of $796,418,000 will be amortized using a level yield interest method over the remaining contractual life of the loan portfolio adjusted for estimated prepayments. Such method results in the recognition of interest income in future periods to approximate a constant rate of return in the loans.

All other discounts and/or premiums resulting from the valuation to fair value of interest bearing assets and liabilities will be amortized using a level yield interest method over the estimated lives of the respective assets or liabilities.

Office of Thrift Supervision

Thrift Bulletin

Handbook: Thrift Activities — Section: 320
Subject: Capital Adequacy — TB 38-2
January 9, 1990

Capital Adequacy: Guidance on the Status of Capital and Accounting Forbearances and Capital Instruments Held by a Deposit Insurance Fund

Summary: This Bulletin informs all savings associations that have been operating under capital or accounting forbearances that Section 5(t) of the Home Owners' Loan Act ("HOLA") eliminates such forbearances. Accordingly, these forbearances should be eliminated in determining whether or not an association complies with the new capital regulation. All associations that do not comply with the new capital regulation must submit a capital plan. This Bulletin also clarifies the treatment of capital instruments held by a deposit insurance fund.

For further Information Contact: The District Office in which you are located or the Supervision Policy Division of OTS, Washington, D.C.

Thrift Bulletin, 38-2

Introduction

Questions have been raised regarding the status of previously granted forbearances and waivers as well as the treatment of FSLIC-owned warrants and other capital instruments. This Bulletin providing guidance to savings associations on these matters.

Capital Compliance

The Office of Thrift Supervision is applying the new capital standards to all savings associations, including those associations that have been operating under previously granted capital and accounting forbearances. Section 5(t) of HOLA as amended by the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) eliminates these forbearances. All savings associations presently operating with these forbearances, therefore, should eliminate them in determining whether or not they comply with the new minimum regulatory capital standards. (Any FSLIC capital contribution that resulted in the creation of goodwill will be subject to the requirements for goodwill established in the capital regulation.)

If the association determines that it will fail its minimum regulatory capital requirements upon the elimination of capital and accounting forbearances, it must submit a capital plan to its District Director in accordance with the regulatory capital regulations and Thrift Bulletin 36.

A capital plan will not be acceptable if it includes the continuation of previously granted capital and accounting forbearances. Capital plans already submitted that propose to continue previous capital and

accounting forbearances will be either disapproved, returned for revision and resubmittal or conditionally approved with the requested forbearance denied.

Capital Instruments Held by a Deposit Insurance Fund

Capital instruments owned by a party with a financial obligation to a savings association will be treated in accordance with Generally Accepted Accounting Principles (GAAP). For example, under 12 CFR 567, for the purpose of the inclusion in capital of instruments owned by the FSLIC or the FDIC, the Office will rely on the presentation standards established under GAAP. FSLIC or FDIC holdings of capital instruments (including, but not limited to, warrants preferred stock and subordinated debentures) will be required to be offset by any receivables (on the asset side of the balance sheet) from FSLIC or the FDIC for the purpose of calculating the amount of such holdings to be included in capital. The amount of the offset is limited to the amount of the FSLIC or FDIC capital instrument.

When there is no offsetting obligation, the value of warrants and other qualifying core capital instuments may be counted as core capital unless the holder of the warrants and other instruments is a federal deposit insurance fund. If the holder of the capital instruments is a federal deposit insurance fund, then they must be classified as supplementary capital.

— Jonathan L. Fiechter
Senior Deputy Director, Supervision Policy

UNITED STATES CLAIMS COURT

No. 90-772 C
(Chief Judge Loren Smith)

GLENDALE FEDERAL BANK, FSB, *Plaintiff,*

v.

UNITED STATES OF AMERICA, *Defendant.*

AFFIDAVIT OF RAYMOND D. EDWARDS IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO LIABILITY

I, Raymond D. Edwards, depose and state as follows:

1. I served as Chief Executive Officer of Plaintiff in this action, which is currently known as Glendale Federal Bank, FSB, from 1968 until 1985, and I served as Chairman of the Board of Glendale from 1972 until 1988. During that period, I also served as Chief Executive Officer (1985-87) and Chairman of the Board (1985-90) of Glendale's parent GLENFED, Inc.

2. I was personally and substantially involved, on behalf of Glendale, in negotiating terms of Glendale's November 19, 1981 contract with the Federal Savings and Loan Insurance Corporation ("FSLIC") and the Federal Home Loan Bank Board ("FHLBB"). Indeed, I executed, on Glendale's behalf, both the Supervisory Action Agreement ("SAA") with FSLIC and Glendale's Agreement of Merger with Broward.

3. I submit this affidavit in support of Glendale's motion for summary judgment on the issue of

liability. I am familiar with the matters set forth herein from my own personal knowledge and from a review of documents produced to Glendale by the United States in discovery.

4. Based on my recollection of the negotiations between Glendale and representatives of the FSLIC and FHLBB, on the economic realities of the proposed transaction, and on my understanding of the terms of the contract Glendale entered into with the FSLIC, it was the intent and understanding of both parties to the SAA that the contract required the government to recognize as capital the goodwill Glendale acquired pursuant to purchase method accounting, and to allow all but a small portion of it to be amortized over 40 years.

5. Without the government's agreement concerning the treatment of the goodwill acquired in the Broward merger, Glendale would not have even considered entering into the transaction. The treatment of goodwill as capital and its amortization over 40 years was the most fundamental element of the transaction. Without that element—or some equivalent, such as cash assistance—the merger would have been financially and economically unthinkable for Glendale.

6. Before we agreed to the merger, I was particularly concerned with Glendale's capital position not only for the period immediately after the merger, but in the years thereafter. Because of this concern, I felt that it was critical to obtain the government's agreement not only to the recognition of goodwill as capital, but also to the 40-year amortization period. If the government had not agreed to this 40-year period, we would have had to reevaluate the assumptions on which our feasibility studies were based as to both projected earnings and maintenance of Glendale's net worth. A shorter amortization period, such as 25

years for example, would have adversely affected projected earnings and changed the transaction sufficiently to have required considerable additional assistance from the government to make the acquisition of Broward financially feasible.

7. At all relevant times, we regarded the government as a contracting partner acting in its own economic and commercial best interests. Glendale knew that, unless the government found a suitable merger partner or acquiror for Broward, the government would have had to pay off Broward's depositors upon liquidation of Broward. Because of Broward's large marked-to-market capital deficit at the time of the merger, such a payout would have cost the government's insurance fund nearly three quarters of a billion dollars. Accordingly, when Glendale negotiated and concluded the SAA with the government, Glendale believed the government was entering into a binding contract intended to advance its own commercial purposes: to induce Glendale to merge with Broward and to avoid that imminent deposit insurance liability of approximately $750 million.

8. Although Glendale initially sought a government cash contribution in the neighborhood of $30 million in addition to the government's commitments regarding goodwill and its amortization period, Glendale settled instead for an interest-rate protection provision. Pursuant to that provision, the government agreed to protect Glendale against adverse interest rate changes, provided that Glendale made a similar commitment to the government should interest rates decline, thus benefiting Glendale. The terms of this interest rate protection provision of the SAA were negotiated in the context of the government's other contract commitments to recognize goodwill as capital over a 40-year amortization period. Had the government not agreed to 40-year amortization for the

goodwill, and required a shorter period instead, the merger may not have been feasible for Glendale. Assuming it remained feasible on some terms, however, the altered projected financial benefits and burdens of the transaction—which would result from a shorter amortization period—would have required Glendale to obtain different terms for interest-rate protection or other government assistance.

9. The government's agreement to recognize as capital the goodwill Glendale acquired under purchase accounting was essential not only to Glendale, but to the government as well. Unless the goodwill counted as capital, and could be amortized over a sufficiently long period of time to allow Glendale to overcome the burden of Broward's tangible capital deficit, FSLIC and the FHLBB would not and could not have approved the transaction. To have done so would have transformed a smaller insolvent S&L into a much larger one, because unless the goodwill could offset Broward's negative tangible capital, Glendale would itself have been very seriously insolvent on the day following the transaction and for many years thereafter.

10. It was my understanding at all relevant times, and still is my understanding, that the government committed itself in the SAA to recognize goodwill as capital and to allow it to be amortized over 40 years, and that it did so for its own economic benefit. I would not have permitted Glendale to enter into the merger with Broward had I thought that the SAA did not represent a binding commitment by the government as to those two critical elements of the transaction.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on 8-23-91

By /s/ Raymond D. Edwards
Raymond D. Edwards

UNITED STATES CLAIMS COURT

Civil Action No. 90-772 C
(Chief Judge Loren Smith)

GLENDALE FEDERAL BANK, FSB, *Plaintiff,*

v.

UNITED STATES OF AMERICA, *Defendant.*

AFFIDAVIT OF DAVID T. HANSEN IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO LIABILITY

I, DAVID T. HANSEN, depose and state as follows:

1. Since February of 1991 I have been Executive Vice President and Chief Financial Officer of Downey Savings & Loan Association. From June 1981 to November 1990 I was Chief Financial Officer of Plaintiff in this action, presently known as Glendale Federal Bank, FSB. At various times during that period I also served as a director of Glendale Federal Bank and Chief Financial Officer of Glendale's holding company, GLENFED, Inc. I am a certified public accountant and a member of the American Association of Independent Certified Public Accountants' ("AICPA") Savings & Loan Committee.

2. I submit this affidavit in support of Glendale's motion for summary judgment on the issue of liability. I am familiar with the matters set forth herein from my own personal knowledge and from a

review of documents in Glendale's files as well as those produced by the United States in discovery to Glendale.

3. Based on my recollection of the negotiations between Glendale and representatives of the FHLBB and FSLIC, my analysis of the financial condition of First Federal Savings of Broward County ("Broward"), and my understanding of the terms of the Supervisory Action Agreement ("SAA") entered into between Glendale and the government, I have no doubt that both parties to the SAA—Glendale and the United States—intended and understood that their agreement required the government to recognize the goodwill acquired under purchase method accounting as capital, and to allow all but a small portion of it to be amortized over the agreed period of 40 years. As Chief Financial Officer of Glendale at the time, I would not and could not have allowed the proposed merger if there was any question as to whether the government agreed in the SAA to recognize goodwill as capital and to allow it to be amortized over 40 years.

4. When Glendale first considered a merger with or acquisition of Broward in the late summer of 1981, we knew that Broward was losing money at the rate of 4 to 7 million dollars per month. After examining Broward's financial statements, we also became aware that the marked-to-market value of Broward's assets (principally loans) was less than the marked-to-market value of its liabilities (principally deposits) by hundreds of millions of dollars. The decline in value of Broward's loans was largely a result of the extraordinarily steep climb in prevailing interest rates in that period, combined with Broward's large portfolio of fixed-rate mortgage loans subject to Florida's state-law interest ceilings.

5. Despite Broward's massive "capital hole," Glendale was interested in pursuing an acquisition or merger so long as the FHLBB and FSLIC agreed to fill the capital hole with cash, notes, or an equivalent. I recall meeting with government representatives at least twice in October of 1981. Exhibit 13 to Glendale's motion for summary judgment as to liability is the agenda for an October 14, 1981 meeting. Exhibit 18 to the motion is a letter confirming certain matters discussed at the October 28, 1981 meeting. From the first negotiations with government regulators regarding the merger, it was understood by both sides that the transaction would be feasible if and only if the government dealt with Broward's large tangible capital deficit in some way. It rapidly became clear that the government's preferred means of doing so was by purchase method accounting pursuant to GAAP. Purchase accounting allowed the tangible capital deficit of Broward to be offset by an equal amount of goodwill—an intangible asset which, under GAAP at that time could be amortized over periods up to 40 years. We were also aware that the transaction could have been alternatively structured under the pooling method of accounting, but that the benefits of goodwill would not have been available under pooling.

6. Glendale understood that the government's motivation in finding a merger partner or acquiror for Broward was to relieve FSLIC of its deposit insurance obligations, which would come due when Broward had to be liquidated. That insurance liability would have cost the government the difference between the marked-to-market value of Broward's assets and its liabilities. That difference was over $700 million in November of 1981. Thus, Glendale understood the government's strong incentive to

resolve Broward's liquidity problems by non-cash means. For its part, Glendale was concerned about maintaining its own healthy capital position, which comfortably exceeded regulatory requirements prior to the Broward merger. Even with Glendale's capital "cushion," however, if the goodwill resulting from the merger could not have been counted as capital, and the merger had still taken place, Glendale would have had a negative net worth immediately following the merger and for many years thereafter.

7. Without the government's agreement as to the use of purchase method accounting and 40-year amortization for goodwill, the Broward merger would never have been approved, let alone seriously considered, by Glendale's responsible directors and officers, including myself. When it entered into the SAA, Glendale understood the government to be committing itself to recognizing the goodwill acquired under purchase accounting as capital and committing itself to allowing that capital to be amortized over 40 years. Absent those commitments, Glendale itself would have been severely undercapitalized—indeed, insolvent—the day the merger was consummated.

8. The 40-year period of amortization was a key element of the agreement. We based our projections of the feasibility of the merger and its effect on Glendale's projected earnings on a 40-year amortization period for the goodwill. Any shorter amortization period would have resulted in very different projections and different earnings estimates, and would have required re-examination of the terms of the merger. Had the government insisted on a shorter amortization period, such as 20 years, Glendale would have insisted on greater amounts of direct assistance from the government. This is because a 20-year amortization period would have required larger write-

offs from capital every year, 1/20 rather than 1/40 of the total amount of goodwill. The difference between writing off 1/20 of $750 million each year ($37.5 million) and 1/40 of $750 million ($18.75 million) each year is significant, and would have affected earnings projections substantially.

9. Even with the government's agreement to allow amortization of goodwill over 40 years, Glendale sought, and received, certain other forms of assistance and assurances. Primary among these was the government's agreement to provide Glendale with protection against adverse interest-rate fluctuations, so long as Glendale made a similar commitment to the government should prevailing interest rates move lower, thus benefitting Glendale. The terms of this interest rate protection provision of the SAA were negotiated by Glendale based upon Glendale's projections referred to in paragraph 8 above, and in the context of the government's other principal assurances relating to purchase method accounting and 40-year amortization. Without the government's agreement to purchase method accounting there would have been no deal. Without the government's agreement to 40-year amortization, there may or may not have been a deal; but at the very least, the terms of financial assistance, including the terms of any interest-rate protection provision agreed to by the parties, would have been very different.

10. Although negotiations about these matters between Glendale and government representatives were not long, they were very focused. Purchase method accounting and 40-year amortization were, from the start, key elements of the agreement that was entered into with government representatives on November 19, 1981. Early in the negotiations, and later in a letter of November 10, 1981, Glendale's

accountants, Peat, Marwick, Mitchell & Co. ("Peat Marwick"), advised Glendale that, under GAAP, use of the purchase method of accounting would be appropriate for the Broward merger, and that the vast majority of the goodwill could be amortized over 40 years. In a letter of November 16, 1981, Exhibit 26 to Glendale's motion, FHLBB staff reviewing the provisional terms of agreement arrived at between Glendale and government representatives requested further information from Glendale to substantiate the reasonableness of the amount of goodwill to be booked and the amortization period of 40 years for that goodwill. In response, the next day, by letter of November 17, 1981 (included in Exhibit 11 to Glendale's motion), I provided the requested information. On the basis of this exchange, the transaction proceeded as negotiated.

11. It was my understanding at all relevant times, and still is my understanding, that the government committed itself in the SAA to recognize goodwill as capital and to allow it to be amortized over 40 years, and that it did so for its own economic benefit. I would not have permitted Glendale to enter into the merger with Broward had I thought that the SAA did not represent a binding commitment by the government as to those two critical elements of the transaction.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ David T. Hansen
David T. Hansen

Dated: September 3, 1991

UNITED STATES CLAIMS COURT

No. 90-772 C
(Chief Judge Loren Smith)

GLENDALE FEDERAL BANK, FSB, *Plaintiff,*

v.

UNITED STATES OF AMERICIA, *Defendant.*

AFFIDAVIT OF HAROLD B. SHORE IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO LIABILITY

I, HAROLD B. SHORE, depose and state as follows:

1. I am an attorney at law licensed to practice in the District of Columbia since 1961, and in the State of California since 1982. I am currently the Chief Corporate Counsel and Corporate Secretary of GLENFED, Inc., the holding company of Plaintiff in this action, currently known as Glendale Federal Bank, FSB ("Glendale"), as well as Corporate Secretary of Glendale. At the time of the negotiation and execution of the Supervisory Action Agreement ("SAA") and Glendale's merger with First Federal Savings and Loan Association of Broward County ("Broward"), I was General Counsel and Corporate Secretary of Glendale.

2. As Glendale's General Counsel, I was involved in the drafting and negotiation of the terms of the SAA and the Agreement of Merger with Broward. I

submit this affidavit in support of Glendale's motion for summary judgment as to liability. I am familiar with the matters set forth herein from my own personal knowledge and from a review of documents in Glendale's files as well as those produced by the United States in discovery.

3. With the assistance of outside counsel, I was involved in the concurrent drafting of both the Agreement of Merger and the SAA, and preparation and review of related transaction documents. We began work on the specific language of these agreements once representatives of Glendale and of the government had reached agreement on the general terms of the SAA, particularly financial terms of the deal and the government's commitment that Glendale could account for the merger using the purchase method, include the goodwill acquired in the merger as an asset for regulatory capital purposes, and amortize most of the goodwill over a forty-year period.

4. Glendale and Broward made their Agreement of Merger expressly conditional upon the government's execution of a SAA satisfactory to Glendale and approval of the deal without any conditions to which Glendale did not agree. The government was fully informed about and familiar with the terms of the Agreement of Merger.

5. After Glendale and the government reached agreement on the general terms of the SAA, in early November, 1981, we began drafting the contractual language while continuing negotiations of the specific provisions of the SAA. Successive drafts of the SAA were circulated among the representatives of Glendale and of the government. These drafts included some of the terms of the contract in their text and some in an attached two-page list of "supervisory" or

"regulatory" matters which had been agreed to by the parties as part of the deal. In early drafts, this list was entitled "Supervisory Waiver Matters" and in later drafts was called "Exhibit B, Supervisory Forbearance." All these drafts of the SAA contained the following provision as item number "6" on the list:

> Glendale's method of accounting for the transaction as a purchase, including periods for amortization of goodwill and discount on loans, to be approved.

Several of the successive drafts of the SAA are included as Exhibits 20-25 to Glendale's summary judgment motion. These exhibits are accurate photocopies of drafts prepared and circulated during the negotiations which were kept in the ordinary course of business in Glendale's legal files, for which I am responsible.

6. With a minor exception not relevant here, all of the matters which had been agreed to by the parties and included on the lists attached to the draft SAA's were included in the final contract, either in the text of the SAA or in the letters and resolutions issued contemporaneously with the SAA and incorporated therein. These terms were fundamental provisions of the contract between Glendale and the government.

7. Pursuant to the terms of the SAA, Glendale paid the government $18.24 million in cash by means of two wire transfers of $5.04 million and $13.2 million to the FSLIC. Accurate photocopies of printouts of the wire transfer confirmations from Glendale's files are included as Exhibit 27 to Glendale's summary judgment motion. I understand that it was and is Glendale's regular practice to retain these documents, generated at the time of making wire transfers, and

Glendale did so in the regular course of business. This was the only cash consideration which changed hands pursuant to the SAA, and it was an integral part of the bargained-for exchange between Glendale and the government.

8. Although the government's new capital regulations imposed following enactment of FIRREA have required Glendale to erase hundreds of millions of dollars of capital from its regulatory net worth, Glendale has complied with the regulatory capital requirements imposed by the regulations at all times on and after December 7, 1989, their effective date. In order to achieve such compliance, Glendale has incurred substantial costs it otherwise would not have incurred. The loss of the use of the bargained-for goodwill has also restricted Glendale's business opportunities, shaken the confidence of investors, hurt Glendale's competitive position, and harmed Glendale in other very real and tangible ways.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Harold B. Shore
Harold B. Shore

Dated: September 4, 1991

UNITED STATES CLAIMS COURT

No. 90-772 C
(Chief Judge Loren Smith)

GLENDALE FEDERAL BANK, FSB, *Plaintiff*,

v.

UNITED STATES OF AMERICIA, *Defendant*.

GLENDALE'S PROPOSED FINDINGS OF UNCONTROVERTED FACT

Plaintiff Glendale Federal Bank, FSB ("Glendale"), pursuant to RUSCC 56(d)(1), submits these Proposed Findings of Uncontroverted Fact in support of Glendale's Motion for Summary Judgment as to Liability filed herewith. Citations below are to pages in Glendale's Memorandum in Support of Motion for Summary Judgment as to Liability. Those pages, in turn, provide the Court with citations to specific supporting Exhibits and Affidavits.

1. Glendale is a federally chartered savings bank with over $20 billion in assets. Until 1989, Glendale was a federally chartered savings and loan association.

2. Effective November 19, 1981, Glendale entered into a transaction with the United States government relating to Glendale's acquisition of First Federal Savings and Loan Association of Broward County ("Broward"). (*E.g.*, pp. 25-29). The terms of Glendale's transaction with the government are set forth in a "Supervisory Action Agreement" dated November 19, 1981 ("SAA"), and in various contemporaneous documents including Federal Home Loan Bank Board

Resolutions Nos. 81-710, 81-711 and 81-712, a "forbearance letter" attached as Exhibit B to the SAA and an Agreement of Merger dated November 12, 1981 between Glendale and Broward. (*E.g.*, pp. 29-33, 40-44). The SAA was executed by Glendale and the Federal Savings and Loan Insurance Corporation ("FSLIC"), an agency of the United States operated by the FHLBB, also an agency of the United States. (*E.g.*, pp. 2-4, 25-29).

3. At the time of Glendale's transaction with the government, Broward had been losing money for many months at rates ranging from $4-7 million per month, and was rapidly heading towards failure. (pp. 10-11). As of November 19, 1981, Broward had a net worth at market value of negative $734,660,000. (*E.g.*, p. 10). If Broward had been allowed to fail and had been liquidated, the government, pursuant to FSLIC's deposit insurance obligations, would have had to satisfy Broward's massive excess liabilities and pay other associated liquidation costs. (*E.g.*, pp. 11-14). As of November 19, 1981, the government estimated the liquidation costs for Broward to be in excess of $783 million. (*E.g.*, pp. 11-12).

4. At the time of Glendale's transaction with the government, FSLIC's deposit insurance fund was running out of cash, and the government therefore was seeking non-cash (or reduced cash) solutions for failing savings and loans like Broward. (pp. 8-10). One non-cash (or reduced cash) technique actively promoted by the government at the time was the "purchase method" of accounting. (pp. 9, 12-15).

5. In the course of negotiations with Glendale over terms of the SAA transaction, the government considered other alternatives for avoiding the failure and liquidation of Broward. (*E.g.*, pp. 25-26). The government determined, however, that no other

merger partner or other solution was available that was as favorable to the government as the terms ultimately agreed to with Glendale. (pp. 25-26).

6. Glendale's merger with Broward became effective on the date of the SAA, and was effectuated pursuant to the Agreement of Merger between Glendale and Broward which was both conditioned upon and incorporated into the SAA and was approved by the FHLBB. (pp. 33-34, 18).

7. In exchange for Glendale's merger with Broward and assumption of Broward's excess liabilities, Glendale and representatives of FSLIC and the FHLBB negotiated and agreed that Glendale would use the purchase method to account for the transaction; that the $734,660,000 in resulting goodwill could be used as an asset for regulatory capital purposes in accordance with Generally Accepted Accounting Principles ("GAAP"); and that most of the goodwill would be amortized over forty years (with a small portion being amortized over 12 years). (pp. 14-33, *passim*).

8. Both parties to the transaction specifically understood that the terms regarding the inclusion of goodwill in regulatory capital and the amortization period for goodwill were fundamental provisions of the deal. (pp. 14-33, *passim*). The FSLIC Director stated at the time that "the major elements of this proposal involve the use of purchase accounting and an FSLIC guarantee." (p. 27). Had the government not agreed to allow Glendale to account for goodwill in this manner, Glendale would not and could not have entered into the transaction. (*E.g.*, pp. 20-21). Moreover, without the terms as to goodwill, the government as regulator would not have approved it. (*E.g.*, p. 21). If Glendale had assumed Broward's excess liabilities without including offsetting goodwill

in capital, it would have rendered Glendale immediately insolvent and subject to governmental takeover. (pp. 20-21).

9. The government's agreements concerning goodwill and its amortization period served, in place of cash assistance, to offset Broward's excess tangible liabilities of $734,660,000 and thereby make the transaction feasible for Glendale and for the government. (*E.g.*, pp. 3-4, 9, 12-14). The government recognized at the time it ratified the SAA that, by using the commitments as to goodwill instead of cash or other assistance, it would save at least $250,000,000. (*E.g.*, pp. 13-14). The government also recognized at the time that the transaction with Glendale saved it over three-quarters of a billion dollars in liquidation costs it would have had to pay if no merger partner had been induced to acquire Broward, and Broward instead had to be liquidated. (*E.g.*, pp. 4, 13-14). At the meeting where the FHLBB ratified the SAA transaction, the FSLIC Director stated his judgment that "I don't think we'll ever see a deal like this one again in terms of its benefit to the FSLIC." (pp. 3, 27).

10. Pursuant to the SAA, Glendale paid an additional $18.24 million in cash directly to the government. (*E.g.*, p. 34). This was the only cash that changed hands pursuant to the SAA. (p. 34, *passim*). The terms of the SAA pursuant to which the $18.24 million was paid were negotiated and agreed to in the context of—and dependent upon—the government's related commitments concerning goodwill and its amortization period. (pp. 34-35). Absent those commitments, the financial terms of the SAA, including the terms pursuant to which the $18.24 million was paid, would have been different. (*E.g.*, pp. 34-35).

11. Both parties recognized and honored their commitments under the SAA, including the provisions

regarding goodwill and its amortization, until 1989. (pp. 33-36). In 1989, the government refused to continue to recognize as a capital asset the goodwill Glendale acquired in its merger with Broward, requiring Glendale immediately to write-off a large portion and phase-out the rest of the goodwill. (pp. 36-39). The government further refused to continue to allow Glendale to amortize the remaining goodwill over the 40-year period agreed between the parties. (pp. 36-39).

12. As a direct result of the government's failure to honor its agreements concerning goodwill and its amortization, Glendale has suffered significant damages and other harm. (*E.g.*, pp. 37-38). Glendale has had to implement costly policies and practices to compensate for the excluded goodwill. (p. 38). In addition, the exclusion of goodwill has restricted Glendale's business opportunities, shaken the confidence of investors, hurt Glendale's competitive position, and harmed Glendale in other ways. (p. 38).

Respectfully submitted,

/s/ Paul G. Gaston
PAUL G. GASTON
Spriggs & Hollingsworth
1350 I Street, N.W.
Suite 900
Washington, D.C. 20005
(202) 898-5800

Counsel of Record for
GLENDALE FEDERAL
BANK, FSB

Of Counsel:

JERRY STOUCK
DANIEL M. PRESS
Springs & Hollingsworth
1350 I Street, N.W.
Suite 900
Washington, D.C. 20005
(202) 898-5800

September 13, 1991

Supreme Court of the United States

No. 95-865

UNITED STATES, PETITIONER,

v.

WINSTAR CORPORATION, ET AL.

[Filed Jan. 19, 1996]

ORDER ALLOWING CERTIORARI

The petition herein for a writ of certiorari to the United States Court of Appeals for the Federal Circuit is granted. The brief of the Solicitor General is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 1, 1996. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday March 29, 1996. A reply brief, if any, is to be filed pursuant to Rule 25.3. Rule 29.2 does not apply.

(6)

Supreme Court, U.S.
FILED
MAR 1 1996
CLERK

No. 95-865

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

WINSTAR CORPORATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE PETITIONER

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

JAMES A. FELDMAN
Assistant to the Solicitor General

DOUGLAS LETTER
JACOB M. LEWIS
SCOTT R. MCINTOSH
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

53 1st

QUESTIONS PESENTED

1. Whether the unmistakability doctrine, which provides that a contract with the government will be interpreted as including a promise by the government not to exercise sovereign regulatory authority only if such a promise is stated in unmistakable terms, is applicable in a breach of contract action in which the plaintiff seeks money damages.

2. Whether, absent a specific congressional authorization to do so, a federal agency has authority to bind itself and its successors by contract to exercise governmental regulatory authority in a particular way, regardless of subsequent legislative changes.

3. Whether the provisions of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, limiting the ability of thrift institutions to use intangible assets to satisfy minimum capitalization requirements, were "public and general acts" for purposes of the sovereign acts doctrine.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Summary of argument	10
Argument:	
Introduction	14
I. A contract with a government agency should be construed to restrict the future exercise of federal regulatory authority only if it does so in unmistakable terms	16
II. The relevant federal agencies had no authority to bind their successors to particular regulatory policies despite subsequent legislative changes	36
III. Respondents' claim for breach of contract damages is also precluded by the sovereign acts doctrine	43
Conclusion	46

TABLE OF AUTHORITIES

Cases:

Amino Brothers Co. v. *United States*, 372 F.2d 485 (Ct. Cl.), cert. denied, 389 U.S. 846 (1967)	44
Astoria Fed. Sav. & Loan Ass'n v. *Solimino*, 501 U.S. 104 (1991)	19-20
Atascadero State Hosp. v. *Scanlon*, 473 U.S. 234 (1985)	19
Atlantic Coast Line R.R. v. *City of Goldsboro*, 232 U.S. 548 (1914)	38
Atlas Corp. v. *United States*, 895 F.2d 745 (Fed. Cir.), cert. denied, 498 U.S. 811 (1990)	44

Cases—Continued: Page

Bowen v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986) 7, 16, 17, 21, 41
Butchers' Union Slaughter-House & Live-Stock Landing Co. v. *Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746 (1884) .. 38
Carteret Savings Bank v. *OTS*, 963 F.2d 567 (3d Cir. 1992) 5, 27
Charter Fed. Sav. Bank v. *OTS*, 976 F.2d 203 (4th Cir. 1992), cert. denied, 507 U.S. 1004 (1993) 22, 26, 27
Contributors to the Pennsylvania Hosp. v. *City of Philadelphia*, 245 U.S. 20 (1917) 38
Deming v. *United States*, 1 Ct. Cl. 190 (1865), appeal dismissed, 76 U.S. (9 Wall.) 145 (1870) 44
Douglas v. *Kentucky*, 168 U.S. 488 (1897) 38
EEOC v. *Arabian American Oil Co.*, 499 U.S. 244 (1991) 19
Fahey v. *Mallonee*, 332 U.S. 245 (1947) 2
Federal Crop Ins. Corp. v. *Merrill*, 332 U.S. 380 (1947) 42
Gregory v. *Ashcroft*, 501 U.S. 452 (1991) 19
Guaranty Financial Services, Inc. v. *Ryan*, 928 F.2d 994 (11th Cir. 1991) 22
Home Building & Loan Ass'n v. *Blaisdell*, 290 U.S. 398 (1934) 37, 38
Home Tel. & Tel. Co. v. *City of Los Angeles*, 211 U.S. 265 (1908) 18, 39, 40
Horowitz v. *United States*, 267 U.S. 458 (1925) 10, 43
Jefferson Branch Bank v. *Skelly*, 66 U.S. (1 Black) 436 (1862) 18, 39
Keefe v. *Clark*, 322 U.S. 393 (1944) 18
Lynch v. *United States*, 292 U.S. 571 (1934) 38, 41, 42
Merrion v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982) 16, 17, 21
National R.R. Passenger Corp. v. *Atchison, T. & S.F. Ry.*, 470 U.S. 451 (1985) 24
North American Commercial Co. v. *United States*, 171 U.S. 110 (1898) 38
OPM v. *Richmond*, 496 U.S. 414 (1990) 42
Perry v. *United States*, 294 U.S. 330 (1935) 41, 42

Cases—Continued: Page

Peterson v. *United States Dep't of the Interior*, 899 F.2d 799 (9th Cir.), cert. denied, 498 U.S. 1003 (1990) 39
Pierce Oil Corp. v. *City of Hope*, 248 U.S. 498 (1919) 38
Providence Bank v. *Billings*, 29 U.S. (4 Pet.) 514 (1830) 17, 18
Security Sav. & Loan v. *Director, OTS*, 960 F.2d 1318 (5th Cir. 1992) 5
Stone v. *Mississippi*, 101 U.S. 814 (1880) 37, 38
The Delaware R.R. Tax, 85 U.S. (18 Wall.) 206 (1873) 18
Tony Downs Foods Co. v. *United States*, 530 F.2d 367 (Ct. Cl. 1976) 44
Transohio Sav. Bank v. *Director, OTS*, 967 F.2d 598 (D.C. Cir. 1992) 5, 20, 22, 36, 39
Trustees of Dartmouth College v. *Woodward*, 17 U.S. (4 Wheat.) 518 (1819) 37
United States v. *Cherokee Nation*, 480 U.S. 700 (1987) 17, 21
United States v. *Dion*, 476 U.S. 734 (1986) 19
United States v. *Nordic Village, Inc.*, 503 U.S. 30 (1992) 19
United States Trust Co. v. *New Jersey*, 431 U.S. 1 (1977) 19, 38
Vicksburg, S. & P.R.R. v. *Dennis*, 116 U.S. 665 (1886) 18
Watt v. *Western Nuclear, Inc.*, 462 U.S. 36 (1983) .. 19
Welch v. *Cook*, 97 U.S. 541 (1878) 25
Wisconsin & Mich. Ry. v. *Powers*, 191 U.S. 379 (1903) 24-25

Constitution, statutes and regulations:

U.S. Const.:
Art. I, § 10, Cl. 1 (Contract Clause) 38, 39
Amend. XI 19
Administrative Procedure Act, 5 U.S.C. 701 (a) (2) 41

Statutes and regulations—Continued: Page

Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990, Pub. L. No. 101-647, Tit. XXV, 104 Stat. 4859:
§ 2551, 104 Stat. 4889 28
§ 2556, 104 Stat. 4892 28
Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 3
Emergency Home Finance Act of 1970, Pub. L. No. 91-351, 84 Stat. 450 3-4
Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 ..... 2, 3
12 U.S.C. 1437 note 3
12 U.S.C. 1441a 3
12 U.S.C. 1464(c)(2)(A) 5
12 U.S.C. 1464(t)(1)(A) 3, 5, 27
12 U.S.C. 1464(t)(2) 4, 5, 27
12 U.S.C. 1464(t)(3) 5, 27
12 U.S.C. 1464(t)(9) 5, 27
12 U.S.C. 1821 3
Garn-St Germain Depository Institution Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 3
12 U.S.C. 1464 (1988) 6, 25
12 U.S.C. 1725(a) (1988) (repealed) 24
12 U.S.C. 1725(c)(3) (1988) (repealed) 9, 40
12 U.S.C. 1726 (1988) (repealed) 6, 25
12 U.S.C. 1729(f)(2)(A) (1988) (repealed) 41
12 U.S.C. 1831*o*(b)(1)(E) 27
12 U.S.C. 1831o(c)(3) 27
12 U.S.C. 1831*o*(h)(3) 27
12 C.F.R.:
Section 546.2 (1982) 6, 25
Section 561.13 (1988) 34
Section 563.22 (1982) 6, 25
Section 567.2 5
Section 567.5 5

Miscellaneous: Page

Accounting Principles Board Opin. No. 16 (1970) .. 4
William Black, *Ending Our Forebearers' Forbearances: FIRREA and Supervisory Goodwill*, 2 Stan. L. & Pol'y Rev. 102 (1990) 28
135 Cong. Rec. (1989):
p. 11,795 5
p. 18,860 3
p. 18,863 3
6 *Corbin on Contracts* (1962) 44
45 Fed. Reg. 72,681 (1980) 4
47 Fed. Reg. (1982):
p. 3543 4
p. 31,859 4
p. 52,961 4
53 Fed. Reg. 334 (1988) 34
54 Fed. Reg. 46,845 (1989) 7
H.R. Conf. Rep. No. 222, 101st Cong., 1st Sess. (1989) 5
H.R. Rep. No. 54, 101st Cong., 1st Sess., Pt. 1 (1989) 2, 4, 5
National Commission on Financial Institutions Reform, Recovery and Enforcement, *Origins and Causes of the S & L Debacle: A Blueprint for Reform, A Report to the President and Congress of the United States* (1993) 28
Restatement (Second) of Contracts (1981) 20, 44
S. Rep. No. 19, 101st Cong., 1st Sess. (1989) 2
David Toscano, Note, *Forebearance Agreements: Invalid Contracts for the Surrender of Sovereignty*, 92 Colum. L. Rev. 426 (1992) 40, 41

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-865

UNITED STATES OF AMERICA, PETITIONER

v.

WINSTAR CORPORATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-52a) is reported at 64 F.3d 1531. The panel opinion of the court of appeals (Pet. App. 53a-105a) is reported at 994 F.2d 797. The opinions of the Court of Federal Claims (Pet. App. 106a-152a, 153a-180a, 181a-182a, 183a-195a) are reported at 21 Cl. Ct. 112, 25 Cl. Ct. 147, 25 Cl. Ct. 541, and 26 Cl. Ct. 904.

JURISDICTION

The judgment of the en banc court of appeals was entered on August 30, 1995. On November 22, 1995, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including December 6, 1995. The petition for a writ of certiorari was filed on December 1, 1995, and was granted on January 19, 1996. 116 S. Ct. 806 (J.A. 648). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183, and its implementing regulations are set forth in an appendix to the petition. Pet. App. 196a-211a.

STATEMENT

This case concerns three separate cases that were consolidated for appeal before the Federal Circuit. The three cases involve a common background and similar legal issues.

1. Savings and loan institutions or "thrifts" have been the subject of pervasive federal support, supervision, and regulation since the 1930s. See *Fahey* v. *Mallonee*, 332 U.S. 245, 250 (1947) ("Banking is one of the longest regulated and most closely supervised of public callings"). The modern thrift industry is "a federally-conceived and assisted system to provide citizens with affordable housing funds." H.R. Rep. No. 54, 101st Cong., 1st Sess., Pt. 1, at 292 (1989) (*House Report*).

In the late 1970s and early 1980s, high interest rates and inflation resulted in a substantial increase in the cost of funds for thrifts. Many thrifts held long-term, low-yielding, fixed-rate mortgages. This " 'negative' interest rate mismatch" precipitated a crisis in the thrift industry. See *House Report* 294-295. Many thrifts were left with severely depleted capital or negative net worth. In these circumstances, "the easiest way to regain profitability and generate adequate levels of new capital, was to grow rapidly"; as a result, thrifts frequently sought to increase the size of their loan portfolios, thus putting even more of their depositors' money at risk. *Id.* at 298-299; S. Rep. No. 19, 101st Cong., 1st Sess. 9 (1989). The result was a record number of failures of thrift institutions and a widespread loss of public confidence.

2. The Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, was enacted in 1989 to prevent the collapse of the thrift industry and to restore it to economic health. Under FIRREA, Congress has appropriated well over $100 billion to close insolvent institutions and recapitalize the federal insurance fund that protects thrift deposits.

FIRREA overhauled the federal thrift regulatory scheme by: (1) abolishing the Federal Savings and Loan Insurance Corporation (FSLIC) and transferring its functions to other agencies; (2) creating a new thrift deposit insurance fund under the Federal Deposit Insurance Corporation (FDIC); (3) eliminating the Federal Home Loan Bank Board (the Bank Board) and replacing it with the Office of Thrift Supervision (OTS)—an office within the Department of the Treasury—with responsibility for the regulation of all federally insured savings associations; and (4) establishing the Resolution Trust Corporation (RTC), charged with liquidating or otherwise disposing of certain closed thrifts and their assets. See 12 U.S.C. 1437 note, 1441a, 1821.

At the "heart" of this legislative reform (135 Cong. Rec. 18,863 (1989) (Sen. Riegle)) was the mandate that OTS "prescribe and maintain uniformly applicable capital standards for savings associations" subject to strict statutory requirements (12 U.S.C. 1464(t)(1)(A)). See also 135 Cong. Rec. 18,860 (1989) (Sen. Chafee) (capital standards the "most critical requirement" of FIRREA and "the backbone of the legislation"). Prior federal regulations had imposed requirements on federally insured institutions, including restrictions on what can be counted as capital in meeting those requirements.[1]

[1] Capitalization requirements have been the subject of numerous statutory and regulatory changes over the years. See, *e.g.*, Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469; Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132; Emergency Home Finance Act of 1970, Pub. L. No. 91-351, 84

FIRREA prescribed three strict new minimum capital requirements that thrifts must satisfy to avoid the threat of closure. See 12 U.S.C. 1464(t)(2) (requirements for "core capital," "tangible capital," and "risk-based capital"), *reprinted at* Pet. App. 197a-198a. The new minimum capital requirements were necessary in order to prevent a recurrence of the thrift crisis, since, "[t]o a considerable extent, the size of the thrift crisis resulted from the utilization of capital gimmicks that masked the inadequate capitalization of thrifts." *House Report* 310.

For at least several years prior to 1981 and until the enactment of FIRREA, the Bank Board had permitted thrifts to use "goodwill" to satisfy federal regulatory capital requirements. Goodwill is an intangible "asset" that, under Generally Accepted Accounting Principles (GAAP), equals the amount by which the cost of an acquisition (including all liabilities assumed by the acquirer) exceeds the fair market value of the acquired tangible assets. See Accounting Principles Board Opin. No. 16, ¶¶ 11 and 87 (1970). In the context of a supervisory merger or acquisition, when such goodwill was created it was known as "supervisory goodwill." [2] Thus, the books of the surviving thrift could carry as an asset the net worth deficit of the acquired or merged thrift.

Another type of intangible asset involved in this case is Regulatory Accounting Practices (RAP) goodwill, or "capital credits." RAP goodwill was created when the Bank Board allowed double counting of funds that FSLIC contributed to merging thrifts, permitting such funds to be counted both as cash and again as goodwill for purposes of meeting regulatory capital requirements.

Stat. 450. In 1982 alone, the regulations governing thrift capital reserve requirements changed three times. See 47 Fed. Reg. 3543; *id.* at 31,859; *id.* at 52,961. See also 45 Fed. Reg. 72,681 (1980) (Bank Board proposal to change regulatory treatment of goodwill).

[2] We use the term "supervisory goodwill" to refer to goodwill that is created in accordance with GAAP in a supervisory transaction.

See *Security Sav. & Loan* v. *Director, OTS*, 960 F.2d 1318, 1320 n.5 (5th Cir. 1992); *Transohio Sav. Bank* v. *Director*, OTS, 967 F.2d 598, 604 (D.C. Cir. 1992).

FIRREA severely restricted the ability of thrifts to continue to use intangible "assets" like supervisory goodwill or capital credits to meet the statute's new minimum capital requirements. 12 U.S.C. 1464(t)(1)(A), (2), (3), and (9); 12 C.F.R. 567.2, 567.5. As Congress recognized, "[g]oodwill is not cash. It is a concept, and a shadowy one at that. When the Federal Government liquidates a failed thrift, goodwill is simply no good. It is valueless. That means, quite simply, that the taxpayer picks up the tab for the shortfall." 135 Cong. Rec. 11,795 (1989). In addition, the undercapitalization of thrifts that results from counting goodwill as an asset results in "excessive risks because of the perception [by the thrift's managers] that the FSLIC insurance fund will pay a substantial portion of the costs if the gamble fails." *House Report* 298. See also H.R. Conf. Rep. No. 222, 101st Cong., 1st Sess. 404 (1989) ("[A]n adequate capital requirement will provide the self-restraint necessary to limit risk-taking by federally insured savings associations.").[3]

3. Respondents are the owners of two now-defunct thrift institutions (United Federal Savings Bank, which was owned by plaintiff Winstar Corporation, and Statesman Bank for Savings, which was owned by plaintiff

---

[3] Although it places strict limits on the use of goodwill and other intangible assets to meet federal capital requirements, FIRREA does not eliminate such use altogether. FIRREA allowed some supervisory goodwill to be used to satisfy some federal capital requirements for a limited period of time, and it permits goodwill to be counted for the purpose of determining the extent to which thrifts may make certain types of loans and investments. See, *e.g.*, 12 U.S.C. 1464(c)(2)(A), 1464(t)(3). Limited discretion was given to OTS on this subject; the statute itself sets forth most of the restrictions on the use of intangible assets like goodwill. See *Carteret Savings Bank* v. *OTS*, 963 F.2d 567, 574-582 (3d Cir. 1992).

Statesman Savings Holding Corp.) and one currently operating thrift, Glendale Federal Bank, FSB. Following enactment of FIRREA, respondents filed three separate actions against the United States in the Court of Federal Claims, seeking monetary relief for asserted breach of contract or frustration of purpose caused by FIRREA, or seeking just compensation for a claimed taking by FIRREA of constitutionally protected property rights.[4] Respondents based their contract claims primarily on agreements that they signed with FSLIC, and on regulatory resolutions and letters issued by the Bank Board. The material facts in the three cases are not identical, but they raise similar legal issues.

In each of the cases, a thrift voluntarily merged with or acquired one or more failing thrifts. This occurred in 1981 (Glendale), 1984 (Winstar), and 1988 (Statesman). Pet. App. 8a, 9a, 11a. In each instance, the thrifts needed the regulatory approval of the Bank Board for the merger or acquisition. See 12 U.S.C. 1464, 1726 (1988); 12 C.F.R. 546.2, 563.22 (1982). That approval was given in resolutions adopted by the Bank Board. In each instance, the thrift and FSLIC also entered into an agreement setting the terms of the transaction and specifying the actual or potential governmental assistance that would be provided.[5]

Goodwill was created in each of the three transactions. Statesman was permitted to count $26 million of the $60 million federal cash contribution to Statesman's acquisi-

[4] Both courts below held that there had been a breach of contract and that respondents were entitled to contract damages. They did not reach respondents' frustration of purpose or just compensation claims, and those claims are not before this Court.

[5] In *Winstar*, the government contributed more than $5.5 million to the transaction, Pet. App. 194a, and in *Statesman*, the government contributed $60 million, *id.* at 10a. Glendale received a number of benefits, including a government guarantee against the effects of rising interest rates for a period of four years. See p. 43, *infra*.

tions as a capital credit. *Glendale* involved $716 million in supervisory goodwill, Pet. App. 9a; *Winstar* involved $9.1 million in supervisory goodwill, *id.* at 28a, 171a; and *Statesman* involved $25.8 million in supervisory goodwill, *id.* at 10a.

FIRREA's new capital requirements became effective when implementing regulations were promulgated by the Office of Thrift Supervision on December 7, 1989 See 54 Fed. Reg. 46,845 (1989). Under FIRREA, the intangible assets at issue that were created in the three transactions could not continue to be counted as capital after a brief phase-out period. The Winstar and Statesman thrifts, like many other thrifts at the time, were unable to meet the new statutory capitalization requirements, and were placed in receivership; they no longer exist. Glendale raised the necessary new capital in private markets and has remained an operating thrift. Pet. App. 14a.

4. In each of these three cases, the Court of Federal Claims held that the subject thrift had a contract with the government promising favorable long-term regulatory treatment of goodwill, and that FIRREA had breached that contract by restricting the use of goodwill to meet the new capitalization requirements.

In *Winstar*, the court held that the thrift had an implied-in-fact contract with the government concerning the treatment of goodwill. Pet. App. 187a. The court rejected the government's argument that any alleged contract between Winstar and FSLIC concerning future government regulation of Winstar should be interpreted under the "unmistakability doctrine" derived from this Court's decision in *Bowen* v. *Public Agencies Opposed to Social Security Entrapment (POSSE)*, 477 U.S. 41, 52-53 (1986), and other cases. That doctrine provides that the government will be held to have contracted not to exercise its sovereign regulatory authority in the future only if a contract expresses that intent in unmistakable terms. Pet. App. 157a-170a. The court found the unmistakability doctrine inapplicable because plaintiffs' claims were for

money damages rather than injunctive relief. *Id.* at 169a-170a. The court then went on to conclude that FIRREA had breached the implied contract by restricting the extent to which the government would count Winstar's goodwill as capital for purposes of meeting regulatory requirements. *Id.* at 171a-172a.

The court also rejected the government's argument that there could be no liability for breach of contract because of the "sovereign acts" doctrine, which precludes breach of contract actions against the government where the government's inability to perform was the result of a "public and general act" of Congress. The court found this doctrine inapplicable because it believed that FIRREA was not a "public and general act" insofar as it abrogated contracts that permitted the use of supervisory goodwill to satisfy federal capital requirements. Pet. App. 173a-179a. The court stated that, in subsequent proceedings, it would determine the amount of the plaintiffs' injuries, if any, and the appropriate damages. *Id.* at 180a.

The court relied on its *Winstar* rulings in its subsequent rulings in *Statesman* and *Glendale*. It held that the plaintiffs in those cases had express contracts with the government concerning future regulatory treatment of goodwill. Pet. App. 120a-125a. The court concluded that the contracts had been breached by FIRREA. It consolidated the two cases, combined them with *Winstar*, and certified its liability determinations for immediate interlocutory appeal. *Id.* at 150a-152a.

5. The Federal Circuit accepted the consolidated cases for interlocutory appeal, and a divided panel reversed the decision of the Court of Federal Claims. Pet. App. 53a-105a. The panel held that the plaintiffs had failed to meet the unmistakability doctrine's high standard for showing that their contracts contained terms promising them a specified form of favorable regulatory treatment for lengthy periods stretching well into the next century. The Federal Circuit then granted respondents' petitions for rehearing *en banc*. After rebriefing and reargument,

the court reversed the panel decision and affirmed the Court of Federal Claims' ruling on liability. *Id.* at 1a-52a.

The Federal Circuit held that the express contracts that FSLIC had made with all three thrifts included promises that each thrift could count supervisory goodwill (and that Statesman could count capital credits as well) as capital for purposes of satisfying federal capital requirements. Pet. App. 17a-29a. In Statesman's case, the court rested its conclusion on Statesman's Assistance Agreement, which permitted it to use $26 million of capital credits to satisfy federal capital requirements. *Id.* at 24a. As noted above, however, none of the Assistance Agreements contained provisions permitting supervisory goodwill to be similarly used. The court held, however, that each thrift's "contract was not limited to the [Assistance Agreement] itself, but also included the contemporaneous resolutions and letters issued by the FSLIC and the Bank Board." *Id.* at 17a (Glendale); see *id.* at 25a (Statesman), 27a (Winstar). In each case, the court interpreted the specification of an amortization period in those documents as constituting a promise that supervisory goodwill could continue to be counted for the length of that period to satisfy regulatory capital requirements, despite future changes in the law. In the case of Glendale, the amortization period was 40 years; in the case of Statesman, 25 years; in the case of Winstar, 35 years. *Id.* at 18a-22a (Glendale), 25a-26a (Statesman), 28a (Winstar). The court then held that FSLIC and the Bank Board had the authority to enter into contracts containing those terms, by virtue of FSLIC's general statutory power "[t]o make contracts," see 12 U.S.C. 1725(c)(3) (1988) (repealed), and the authority of FSLIC and the Bank Board "to extend assistance to acquirers of insolvent FSLIC-insured thrifts * * * and to set minimum capital limits on a case-by-case basis." Pet. App. 39a.

The Federal Circuit declined to apply the unmistakability doctrine in interpreting the contracts in this case; it agreed with the Court of Federal Claims that the un-

mistakability doctrine is inapplicable where plaintiffs seek only money damages. Pet. App. 31a-38a. The court of appeals also held the sovereign acts doctrine inapplicable; in the court's view, FIRREA cannot be said to be a "public" and "general act" because it "singles out supervisory goodwill for special treatment, albeit treatment less harsh than other forms of intangible assets." *Id.* at 42a.

Judge Nies dissented, essentially for the reasons given in her prior opinion for the panel. Pet. App. 47a-48a. In her view, "no clause can be found in the contracts under which the Bank Board and the FSLIC promised to pay if Congress decided to step in and do away with the 'purchase method of accounting,' a euphemism for spinning straw into gold, and other accounting gimmicks." *Id.* at 48a. Therefore, "[i]n this highly regulated industry, the thrifts did not negotiate contracts that freed them from the risk of a change in regulations." *Ibid.* She also stated that the majority's approach "impermissibly fuses 'the two characters which the government possesses as a contractor and as a sovereign.' " *Id.* at 47a (quoting *Horowitz* v. *United States*, 267 U.S. 458, 461 (1925)). In her view, the thrifts' sole possible remedy at this point was to seek compensation for a taking, and she believed that the matter should be remanded to the trial court for a determination of whether a taking had occurred. Pet. App. 47a.

Judge Lourie also dissented. Pet. App. 49a-52a. He believed that "the sovereign acts doctrine is a barrier to the thrifts' recovery under a breach of contract theory." *Id.* at 49a. In his view, FIRREA was a public and general act because "Congress did not act only against certain thrifts or contracts; it acted to deal with the entire thrift system in order to save it." *Id.* at 50a-51a.

SUMMARY OF ARGUMENT

I. Under respondents' theory, the FSLIC agreements and Bank Board letters and resolutions authorizing their transactions constituted binding contractual commitments

that, regardless of any change in the governing statutes, the government would continue to allow them to count goodwill to satisfy federal regulatory capital requirements well into the next century. Respondents thus contend that the government entered into contract provisions promising that it would exercise its sovereign regulatory powers in a particular way for 25 to 40 years (or, in the case of Statesman's capital credit, indefinitely). Such highly unusual contractual commitments are strongly disfavored. Under the unmistakability doctrine, they must, if they are to be recognized at all, be expressed clearly and unmistakably in the language of the contractual documents. That standard is not satisfied here.

Contracts entered into by government regulators with private parties promising specific regulatory treatment in the future may harmfully limit the ability of government to act to serve the public interest. The unmistakability doctrine protects against that danger. It helps to ensure that public officials who enter into contracts—and others who review them—are fully aware of the serious step they are taking before they agree that the government will not exercise sovereign regulatory authority in the future. It also ensures that, where there is any possible ambiguity, courts do not mistakenly construe contracts to restrict the government's regulatory authority.

The Federal Circuit held the unmistakability doctrine inapplicable in this case because it believed that suits for contract damages, unlike suits for injunctions, do not threaten the government's exercise of sovereign regulatory authority. That holding is incorrect. This Court's cases make clear that the unmistakability doctrine governs the *interpretation* of the promises made in a contract, not the *relief* to be afforded for a breach. The unmistakability doctrine protects against requiring the public to pay in damages for the privilege of changing government policy, just as it protects against injunctions precluding such alterations altogether.

The contract provisions on which the Federal Circuit relied in this case do not in fact contain promises that respondents' goodwill will continue to be counted for purposes of satisfying federal regulatory capital requirements. With the exception of a reference to Statesman's capital credits, the Assistance Agreements include no express promises regarding goodwill at all. And even if those Agreements are read to include Bank Board resolutions and forbearance letters, the relevant portions of those documents contain directives as to what respondents must do to comply with current regulatory policy, not commitments by the government to continue to permit goodwill to be counted as capital. In addition, each of the contracts makes quite clear in other provisions that the risk of subsequent legislative change was to be borne by respondents. Those provisions establish that respondents never obtained the promises they allege, even under ordinary principles of contract interpretation. Under the unmistakability doctrine, a court certainly may not construe those documents to contain those promises.

II. Even if respondents had unmistakably obtained the promises they allege, those promises would be invalid and unenforceable because the thrift regulators who would have made them would not have had the authority to bind future Congresses. Under the "reserved powers" doctrine, this Court has frequently held that core sovereign powers may not be alienated by a legislature. That principle applies even more powerfully to alienations of future legislative power alleged to have been made by administrative officials.

The right to set future policy for thrift capital safety is a power exercised by Congress. Before an administrative agency could be held to have committed future Congresses not to exercise it, a court must assure itself that Congress actually delegated such authority. Under settled precedent, general grants of authority to carry on an agency's ordinary business are insufficient for that purpose. Thus, even if the right to set future thrift capital

policy is not a reserved power, any commitments made by federal regulators that thrift capital requirements would not be changed would be *ultra vires* and invalid.

III. Finally, even if respondents had obtained the contractual commitments they allege, and even if the agencies had authority to make such commitments, respondents could nevertheless not obtain breach of contract damages. Under the sovereign acts doctrine, the United States and its agencies are immune from liability for breach of contract when a public and general sovereign act—such as the enactment of FIRREA—makes the government's performance of a contractual commitment impossible. The purpose of the doctrine is to put the government on the same footing as private parties, who are similarly generally protected from breach of contract actions when their performance of a contract is rendered impossible by a change in law.

FIRREA was "public and general." It was an integral part of a systematic overhaul of the entire thrift regulatory scheme, designed to rescue an ailing industry and restore public confidence. The provisions limiting the ability of a thrift to treat goodwill as capital were a crucial feature of the reforms. They apply to all thrifts and to all forms of goodwill, whether originating in supervisory transactions (as here) or not. The only relevant FIRREA provisions that were directed specifically at thrifts that had supervisory goodwill or capital credits provided a partial exemption and transition period to ease the strict rules that otherwise would govern. The Federal Circuit erred in relying on those provisions—which had the effect of giving respondents (among others) a special *benefit*—to find that FIRREA was not a "public and general" act under the sovereign acts doctrine.

ARGUMENT

Introduction

Respondent thrifts each engaged in mergers with, or acquisitions of, failing thrifts prior to the enactment of FIRREA. In order to complete those transactions, the thrifts needed the formal approval of the Bank Board. That approval was contained in Resolutions of the Board, supplemented by Bank Board forbearance letters. Those documents were not contracts between the Bank Board and the thrifts. They were, instead, statements of the conditions that the thrifts would have to satisfy in order to obtain Board approval of the transac[illegible]s. Bank Board policy at the time permitted respondents to count goodwill as an asset for purposes of satisfying federal capital requirements. The Resolutions and forbearance letters made clear how respondents were to comply with the existing goodwill capital policy. The Board Resolutions and forbearance letters made no promises regarding the continuation of existing capital requirements or the policy under which goodwill could be counted as capital.

In connection with their transactions, respondents sought and obtained valuable government cash and noncash financial assistance. Contractual commitments to furnish such assistance were contained in contracts called Assistance Agreements or Supervisory Action Agreements between FSLIC and respondents. Those Agreements provided that FSLIC would, *inter alia*, assist the Winstar and Statesman transactions with cash contributions and would assist the Glendale transaction with a valuable guarantee against rising interest rates. The Agreements also committed respondents to take certain steps thought necessary to protect the government's investment, such as submitting to audits and vigorously pursuing claims held by the merged or acquired institutions. With the exception of the Statesman capital credit, these contracts, like the Board Resolutions and forbearance letters, make no promises regarding (indeed, do not even mention) (federal capital requirements or the treatment of supervisory goodwill as capital. They contain no undertaking by FSLIC that its parent body—the Bank Board—or Congress would not change those requirements or the treatment of goodwill under them.

The basic error committed by the courts below lay in beginning its analysis by hypothesizing an intent by the thrift regulators to promise that the federal government would continue to count goodwill as capital for purposes of satisfying federal regulatory capital requirements for decades into the future, regardless of any statutory or regulatory changes in federal policy governing the required financial soundness of thrifts. The courts then found evidence for that promise by incorrectly treating the regulatory documents—the Bank Board Resolutions and forbearance letters—as contractual agreements, and by interpreting the terms of those documents —contrary to their plain meaning—as making promises that goodwill would continue to be treated as capital in the future.

The courts below were led into this erroneous conclusion by their failure to apply the unmistakability doctrine, a doctrine that precludes courts from assuming that the government has contracted away its power to regulate unless such abdication is expressed with unmistakable clarity. Recognition of this error by this Court obviates the need to inquire whether Congress ever gave the thrift regulators the authority to commit the government not to change its regulatory policy. If such an inquiry were to be undertaken, however, settled precedent of this Court establishes that any such promises would, in fact, have been *ultra vires*, and therefore invalid and unenforceable. Finally, the sovereign acts doctrine would in any event preclude respondents from recovering damages for regulatory acts required by Congress's enactment of FIRREA.

I. A CONTRACT WITH A GOVERNMENT AGENCY SHOULD BE CONSTRUED TO RESTRICT THE FUTURE EXERCISE OF FEDERAL REGULATORY AUTHORITY ONLY IF IT DOES SO IN UNMISTAKABLE TERMS

1. Respondents allege that the government contracted in these cases to limit its exercise of its regulatory authority for periods of between 25 and 40 years (or indefinitely, in the case of the treatment of Statesman's capital credits). Under respondents' theory, the government also contracted not to apply to them for many years future federal statutes that might strengthen capital requirements for operating thrifts.

Under long-established principles, contracts that limit the government's future exercises of regulatory authority are strongly disfavored; such contracts will be recognized only rarely, and then only when the limitation on future regulatory authority is expressed in unmistakable terms. Thus, in *Bowen* v. *Public Agencies Opposed to Social Security Entrapment (POSSE)*, 477 U.S. 41, 52-53 (1986), the Court referred to its "often-repeated admonitions that contracts should be construed, if possible, to avoid foreclosing exercise of sovereign authority." *POSSE* involved a claim by certain States that they had entered into contracts with the federal government giving them the right to withdraw their employees from the Social Security system, despite subsequent legislation making such withdrawal illegal. The Court refused to construe the provisions relied upon by the States as having that effect. It relied on the principle that "courts should be extremely reluctant to construe [agreements] in a manner that forecloses Congress' exercise of [its sovereign] authority." *Id.* at 52 . The Court concluded that "contractual arrangements, including those to which a sovereign itself is party, 'remain subject to subsequent legislation' by the sovereign." *Ibid.*

In *POSSE*, the Court relied upon its decision in *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 148

(1982), for the governing legal principles. See 477 U.S. at 52. *Merrion* involved an Indian Tribe's ability to impose a severance tax on oil and gas production on reservation land. The Tribe had previously negotiated leases with the oil and gas producers that included royalty payments to the Tribe. The Court held that the royalty payment agreement should not be construed as a surrender of the Tribe's sovereign right to impose a subsequent tax, absent an unmistakable surrender of that right. The Court stated that "sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact *unless surrendered in unmistakable terms.*" 455 U.S. at 148 (emphasis added).

One year after *POSSE*, in *United States* v. *Cherokee Nation*, 480 U.S. 700, 707 (1987), the Court again invoked the unmistakability doctrine in refusing to construe a federal agreement to cede title to a riverbed to an Indian Tribe as having surrendered the federal right to keep the river navigable in the future. The plaintiffs there sought monetary compensation from the United States because of alleged damage to the riverbed caused by federal efforts to ensure navigability. The Court stated that a waiver of this "sovereign authority will not be implied, but instead must be 'surrendered in unmistakable terms.'" *Ibid.*

2. The principle that a contractual surrender of a sovereign power for the future should never be found without unmistakable language to that effect was recognized by this Court as early as 1830, in *Providence Bank* v. *Billings*, 29 U.S. (4 Pet.) 514, 560-561 (1830). In that case, a bank claimed that its state charter should be construed to have surrendered the right of the State to tax it in the future, and that the subsequent imposition of a tax was thus unconstitutional. In an opinion by Chief Justice Marshall rejecting the claim, the Court explained that, "[t]he whole community is interested in retaining [the taxing power] undiminished; that community has a right to insist, that its abandonment ought not

to be presumed, in a case in which the deliberate purpose of the state to abandon it does not appear." *Id.* at 561.

Relying on *Providence Bank*, this Court has repeatedly reaffirmed the principle that "neither the right of taxation, nor any other power of sovereignty, will be held by this court to have been surrendered, unless such surrender has been expressed in terms too plain to be mistaken." *Jefferson Branch Bank* v. *Skelly*, 66 U.S. (1 Black) 436, 446 (1862). See also *Keefe* v. *Clark*, 322 U.S. 393, 396 (1944); *Vicksburg, S. & P.R.R.* v. *Dennis*, 116 U.S. 665, 668 (1886) (collecting early cases). As this Court commented in *The Delaware R.R. Tax*, 85 U.S. (18 Wall.) 206, 225-226 (1873), that unmistakability rule applies "with special force" where it is the government's *regulatory* authority, rather than the mere expenditure of government funds, that was allegedly contracted away —*i.e.*, "when the right, privilege, or immunity claimed calls for any abridgment of the powers of the government, or any restraint upon their exercise." If the government has the authority to agree not to exercise a sovereign power at all, "the surrender when claimed must be shown by clear, unambiguous language, which will admit of no reasonable construction consistent with the reservation of the power." *Id.* at 226. See also *Home Tel. & Tel. Co.* v. *City of Los Angeles*, 211 U.S. 265, 273 (1908).

3. The unmistakability doctrine serves important public purposes. Contracts in which the government promises not to exercise its future regulatory authority in certain ways constitute a direct impairment of the government's ability to serve the public interest, should regulation of the sort prohibited by the contract become necessary or advisable at a later time. In most circumstances, it is extremely doubtful whether government officials have the power to enter such contracts at all. See pp. 36-43, *infra*. At the very least, it should not be assumed that they have done so unless that intention is expressed in the clearest possible terms. An error in construing a contract to surrender sovereign regulatory authority for

the future, when that result was neither intended nor authorized, might have enormously serious consequences —consequences much more serious than an error in the opposite direction. The doctrine also helps to ensure that, before officials take a step as significant as contracting away the government's right to exercise future sovereign regulatory authority, the parties to the contract, as well as other officials with oversight responsibility or other interests in the area, will be on full notice that such a step is being taken.[6]

In this respect, the unmistakability doctrine is closely related to clear statement rules that are applied elsewhere in the law. For example, in *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234 (1985), this Court noted that a waiver of Eleventh Amendment immunity "implicates the fundamental constitutional balance between the Federal Government and the States." *Id.* at 238. Therefore, "a State will be deemed to have waived its immunity only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." *Id.* at 239-240 (internal quotation marks omitted).[7] Somewhat

---

[6] As Justice Brennan commented, "[t]he Framers fully recognized that nothing would so jeopardize the legitimacy of a system of government that relies upon the ebbs and flows of politics to 'clean out the rascals' than the possibility that those same rascals might perpetuate their policies simply by locking them into binding contracts." *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 45 (1977) (Brennan, J., dissenting).

[7] See also *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992) (waivers of federal sovereign immunity); *Gregory* v. *Ashcroft*, 501 U.S. 452, 460-461 (1991) (alteration of federal/state balance); *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (legislation applying outside territorial jurisdiction of United States); *United States* v. *Dion*, 476 U.S. 734, 740 (1986) (abrogation of Indian treaty rights); *Watt* v. *Western Nuclear, Inc.*, 462 U.S. 36, 59 (1983) ("land grants are construed favorably to the Government, [and] * * * nothing passes except what is conveyed in clear language"); cf. *Astoria Fed. Sav. & Loan Ass'n*

similar principles apply to the interpretation of purely private contracts, where "[i]n choosing among the reasonable meanings of a promise or agreement or a term thereof, a meaning that serves the public interest is generally preferred." Restatement (Second) of Contracts § 207 (1981). As the drafters of the Restatement understood, that principle in effect constitutes a clear statement rule disfavoring terms contrary to the public interest.[8]

4. The Federal Circuit declined to apply the unmistakability doctrine in this case. In doing so, the court did not question the proposition that the respondents here rely on claimed contractual terms that would limit the future exercise by the government of its sovereign regulatory authority.[9] Instead, the court pointed to the fact that "[t]he thrifts did not ask for * * * injunctive relief that would have enjoined the thrift regulators from applying the FIRREA requirements to the thrifts," and "[m]oney damages, in contrast to injunctive relief, presents

v. *Solimino*, 501 U.S. 104, 108 (1991) ("Rules of plain statement and strict construction prevail only to the protection of weighty and constant values, be they constitutional or otherwise.") (citation omitted).

[8] The Restatement sets forth the following illustration: An inventor assigns "all * * * rights in a pending patent application and all improvements on the invention covered." Restatement (Second) of Contracts § 207 illus. 1, at 106 (1981). The inventor makes a future invention and the assignee claims it as an improvement. In that circumstance, "[t]he public interest in encouraging invention supports an interpretation of the agreement excluding future improvements unless future improvements were specifically included" (*ibid.*), *i.e.*, unless future improvements were unambiguously specified.

[9] A term in a government contract involves sovereign regulatory authority if it "could appear only in contracts with the government, such as a waiver from future regulation." *Transohio Sav. Bank* v. *Director, OTS*, 967 F.2d 598, 623 (D.C. Cir. 1992). On the other hand, contract "terms that resemble those in contracts between private parties, such as the price term in a lease of land," do not implicate sovereign regulatory authority. *Ibid.*

little threat to the government's sovereign powers." Pet. App. 37a.[10]

The unmistakability doctrine, however, is a principle governing contract *interpretation*, not contract *relief*. This Court has never suggested that the doctrine becomes inapplicable because a plaintiff seeks only monetary relief. Indeed, in *Cherokee Nation*, the plaintiffs sought only monetary "compensation [under the Takings Clause] for damage to the[] riverbed interests" that they alleged had been harmed. 480 U.S. at 701. Such compensation did not prevent the government from protecting navigation on the river; it would, however, have required the government to pay the plaintiffs for the value of the navigational servitude. The Court applied the familiar doctrine that "a waiver of sovereign authority will not be implied, but instead must be 'surrendered in unmistakable terms.' " *Id.* at 707.[11]

More pragmatically, the Federal Circuit's conclusion that a claim for money damages "presents little threat to the government's sovereign powers," Pet. App. 37a, is simply wrong. A governmental obligation to pay substantial damages as the price for exercising regulatory authority unquestionably carries the danger that needed future regulatory action will be deterred. The unmistakability doctrine rests on the reluctance to assume that officials (or legislators) to whom sovereign authority is entrusted will act to control or limit the exercise of that

[10] See also Pet. App. 37a-38a ("The Supreme Court's decision in *POSSE* is predicated on the need to protect the sovereign's legislative power and that concern is inapplicable where money damages alone are at issue.")

[11] This Court's descriptions of the unmistakability doctrine have always made clear that the doctrine has to do with the construction of contracts, not the relief sought. See, *e.g.*, *POSSE*, 477 U.S. at 52 ("courts should be extremely reluctant to construe [the contracts at issue] in a manner that forecloses Congress' exercise of [its sovereign] authority"); *Merrion*, 455 U.S. at 147 (relying on "established principles for determining whether other governmental bodies have waived a sovereign power through contract").

authority by their successors. That reluctance fully applies when a future body of citizens would be required to pay (in damages) for the privilege of having its government's regulatory powers used to serve its current needs. The rule of law proposed by the Federal Circuit would also lead to absurd results in a case in which a plaintiff seeks both an injunction and damages; such a contract would have to be interpreted one way in ruling on the claim for injunction, and in a different way in ruling on the damages claim.

Respondents' claims in this case depend on the proposition that the federal thrift regulators entered into contracts that committed the government to follow certain regulatory policies for 25 to 40 years into the future, and that Congress then violated those commitments by enacting new regulatory legislation. Under established principles, the documents relied upon by respondents to reach that unusual result should not be construed to contain such contractual commitments unless agreements to that effect were expressed with unmistakable clarity. We now turn to an examination of the documents relevant to this case to see whether such clarity is present.[12]

5. Examination shows that the language relied upon by respondents in this case does not unmistakably grant respondents the right, despite future legislative changes, to continue to count goodwill as capital for purposes of meeting federal capital requirements. On the contrary, the language of the documents demonstrates that careful attention was paid to limiting the contractual commitments of the United States to actions that would be taken to comply with then-current regulatory policy; no

[12] Three courts of appeals, contrary to the court below, have applied the unmistakability doctrine to contracts similar to those in this case. See *Charter Fed. Sav. Bank* v. *OTS*, 976 F.2d 203 (4th Cir. 1992), cert. denied, 507 U.S. 1004 (1993); *Transohio Sav. Bank* v. *Director, OTS*, 967 F.2d 598 (D.C. Cir. 1992); *Guaranty Financial Services, Inc.* v. *Ryan*, 928 F.2d 994, 1000-1001 (11th Cir. 1991).

promises were made that that policy would not be changed or that respondents would be immune from such changes, if they were made.

a. *Glendale*

In connection with Glendale's 1981 merger with a troubled thrift, First Federal Savings and Loan of Broward County, Florida, FSLIC entered into a Supervisory Action Agreement (SAA) with Glendale. That contractual document did not include any promises relating to supervisory goodwill, and the Federal Circuit did not hold that it did.[13] Instead, the court below held (1) that the Glendale SAA's "integration" clause included in the contract the substantially contemporaneous Bank Board Resolution 81-710, see Pet. App. 17a-18a, and (2) that that Resolution, in turn, contained a promise that the Bank Board would continue to count Glendale's supervisory goodwill as capital for purposes of satisfying federal capital requirements, despite any changes that might be made in governing legislation.[14]

Although the SAA incontrovertibly *refers* to the Bank Board Resolution, the Federal Circuit erroneously concluded that that reference transformed the statements in the Resolution into contractual commitments of the government. The integration clause provided, in relevant part:

> This Agreement, together with an interpretation thereof or understanding agreed to in writing by the

[13] The SAA did provide a number of other benefits for Glendale, including protection against interest rate increases, see J.A. 591-593, which threatened the health of the thrift industry at the time; a federal agreement for a variety of short-term cash advances, see J.A. 596-598; and indemnification against unknown liabilities of Broward for a ten-year period, see J.A. 593-594.

[14] The SAA expired in November 1991. See J.A. 598. In our view—though not in Glendale's—any promise regarding supervisory goodwill could have committed federal regulators only until that date.

> parties, constitutes the entire agreement between the parties thereto and supersedes all prior agreements and understandings of the parties in connection herewith, excepting only the Agreement of Merger and any resolutions or letters issued contemporaneously herewith by the [Bank Board] or the FSLIC.

J.A. 598-599; see Pet. App. 17a. The court of appeals held that the Bank Board Resolution was "[o]ne of these contemporaneous documents," *id.* at 18a, referred to in the last clause of the integration clause, and that "all of the contemporaneous documents * * * under the integration clause of the SAA collectively constituted the 'Agreement' of the parties," *id.* at 21a.

The Federal Circuit was correct in holding that, under the integration clause, Bank Board Resolution 81-710 was a "resolution * * * issued contemporaneously * * * by the [Bank Board]." Bank Board Resolution 81-710 was adopted by the Board on November 19, 1981, the same day that the SAA between FSLIC and Glendale was signed. By the terms of the integration clause, the Resolution was, therefore, not "supersede[d]" by the 1981 SAA with Glendale.[15] That, however, does not suggest that the terms of the Bank Board Resolution were transformed by the SAA into contractual commitments of the government.[16]

---

[15] The governing statute, 12 U.S.C. 1725(a) (1988), provided that FSLIC "shall be under the direction of the Federal Home Loan Bank Board and operated by it under such bylaws, rules, and regulations as it may prescribe for carrying out [its statutory] purposes." The Bank Board thus acted as the ultimate authority for FSLIC, similar to a board of directors. It is therefore understandable that FSLIC, when entering into a contract, would have wanted to ensure that it was taking no action that would "supersede" or contradict an official Bank Board policy.

[16] This court has cautioned against reading statutes to constitute contractual commitments by the government. See, *e.g.*, *National R.R. Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, 470 U.S. 451, 465-469 (1985); *Wisconsin & Mich. Ry.* v. *Powers*, 191 U.S. 379, 386-387 (1903); *Welch* v. *Cook*, 97 U.S. 541 (1878). For the same reasons, agency adjudicatory decisions are not ordinarily contractual documents, and they were not in this case.

Resolution 81-710 was a regulatory agency decision that approved an application by Glendale to consummate a merger that required regulatory approval. See 12 U.S.C. 1464, 1726 (1988); 12 C.F.R. 546.2, 563.22 (1982). It contains no mention of federal regulatory capital requirements and no promise by the government that Glendale could continue to count regulatory goodwill as an asset despite changes in governing legislation or regulatory policy. The court of appeals, however, found such a contractual promise in the portion of the Bank Board Resolution that provided:

> Glendale shall furnish an opinion from its independent accountant, satisfactory to the Supervisory Agent, which (a) indicates the justification under generally accepted accounting principles for the use of the purchase method of accounting for its merger with Broward, (b) specifically describes, as of the Effective Date, any goodwill or discount of assets arising from the merger to be recorded on Glendale's books, and (c) substantiates the reasonableness of amounts attributed to goodwill and the discount of assets and the resulting amortization periods and method.

Pet. App. 18a-19a; J.A. 607.[17] The evident purpose and function of those Resolution provisions, however, was not to make promises about future regulatory policy, but to inform Glendale about how to record the merger transac-

---

[17] The Resolution also provided that "Glendale shall submit a stipulation that any goodwill arising from this transaction shall be determined and amortized in accordance with" a Bank Board Memorandum that discussed the documentation a thrift had to provide if it wanted to use the purchase method of accounting. Pet. App. 19a; see *id.* at 19a n.4 (quoting Memorandum). See also J.A. 607, 573. The amortization period works out to be 40 years.

tion on its books and what kind of documentation Glendale was required to provide in order to satisfy then-current Bank Board policies.[18] As the Fourth Circuit stated in *Charter Fed. Sav. Bank* v. *OTS*, 976 F.2d 203, 211 (4th Cir. 1992), cert. denied, 507 U.S. 1004 (1993), "resolutions issued by the [Bank Board] in connection with the mergers merely granted that agency's approval of the merger and the accounting practices employed by [the thrift] in connection therewith." Nothing in the language of the Resolution committed the Bank Board or Congress to continue to treat goodwill as an asset for purposes of satisfying federal capital requirements in the future. Indeed, in light of the frequency with which federal capital requirements had changed in the past, see p. 3, n.1, *supra*, it would have been unreasonable for Glendale, FSLIC, or the Bank Board to expect or rely upon the fact that those requirements would remain unchanged.

The court of appeals also relied on what it termed "other evidence and * * * the circumstances surrounding the transaction." Pet. App. 22a. The court noted that, "[w]ithout the use of supervisory goodwill, the merged thrifts would have been in a failing position" that would have caused FSLIC exactly the losses that it was trying to avoid by approving the merger. *Ibid.* The court thus correctly understood that the Bank Board's policies at the time of the Glendale SAA in 1981 permitted the thrift to use supervisory goodwill to satisfy regulatory capital requirements. The merger transaction permitted FSLIC to avoid (at least for the time being) substantial losses that would have occurred had Broward been put into receivership. And, for the very reason that the Bank Board wanted to avoid closing institutions unnecessarily, the Bank Board was unlikely to change its capitalization

[18] The Federal Circuit correctly noted (Pet. App. 20a-21a) that Glendale in fact submitted the required accountant's letter, and that it was satisfactory to the Bank Board. Neither fact supports Glendale's argument that the Bank Board, by accepting the letter, agreed to freeze then-current capital requirements for a period of 40 years.

policies quickly. Indeed, the policy permitting goodwill to be included in capital was not changed for eight years, and then the change was made by Congress in FIRREA, and not by the Board.

The court below also noted that "it is appropriate to observe that no healthy thrift would consummate a transaction that immediately put it in regulatory noncompliance." Pet. App. 22a. We agree that a healthy thrift would not enter into an agreement and arrangement that would immediately render it insolvent and subject to closure under existing regulatory policy.[19] But Glendale did not enter into such an arrangement. Under existing regulatory policy it remained solvent upon absorbing Broward. The relevant question is whether Glendale would take a risk that this regulatory policy might change in the future. As a number of observers—including a commission charged by statute with investigating the causes of the thrift crisis—have explained, transactions of this sort offered a number of immediate benefits to the acquiring thrift that would justify taking just such a risk.[20]

[19] It should be noted, however, that thrifts generally operate subject to the risk of statutory change that might threaten them with closure. See *Carteret Sav. Bank* v. *OTS*, 963 F.2d 567, 581 (3d Cir. 1992) (noting the "massively regulated banking industry, where the rules of the game change with some regularity"); *Charter*, 976 F.2d at 212 (explaining that since "[c]apital requirements have been an evolving part of the regulatory scheme since its inception," the Bank Board "would have expected changes in statutory requirements, including capital requirements"). There thus is always the possibility that Congress will increase the federal capital requirements or their method of implementation and thereby threaten some thrifts with the possibility of immediate closure. For example, in FIRREA, see 12 U.S.C. 1464(t)(1)(A), 1464(t)(2), (3), and (9), Congress increased the capital requirements, and in a subsequent statute, Congress *required* federal regulators to appoint a receiver for any institution that remained critically undercapitalized by a certain measure for a one-year period, see 12 U.S.C. 1831*o*(b)(1)(E), 1831*o*(c)(3), 1831*o*(h)(3).

[20] Acquisitions of insolvent thrifts "were tempting to other [thrifts] trying to stave off accounting insolvency because acquirers

One other provision of the SAA has a bearing on the meaning of the Glendale contract. The SAA included a provision stating that "[n]othing in this Agreement shall require any unlawful action or inaction by either of the parties hereto." Pet. App. 23a; see J.A. 600. The most natural reading of that provision is to allocate to Glendale the risk of a change in law—especially statutory law—that might affect the parties' executory contractual commitments. As such, the clause is sufficient by itself to defeat Glendale's claim. At the very least, it establishes that the contract did not unmistakably give Glendale a right to count supervisory goodwill as capital for purposes of satisfying federal capital requirements after the governing statute was changed to make it illegal for it to do so.[21]

b. *Winstar*

The Winstar transaction was quite similar to the Glendale transaction. As with Glendale, FSLIC entered into

---

could show fictitious income and continue to pay (indeed increase) dividends, high salaries, and so on." National Commission on Financial Institutions Reform, Recovery and Enforcement, *Origins and Causes of the S&L Debacle: A Blueprint for Reform, A Report to the President and Congress of the United States* 38-39 (1993) (*Blueprint*). See Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990, Pub. L. No. 101-647, Tit. XXV, §§ 2551, 2556, 104 Stat. 4889, 4892. In addition, because of complicated rules regarding thrift accounting, amortization, and valuation of assets, accumulation of intangible assets such as goodwill could be quite profitable. See *Blueprint* 38-39. See also William Black, *Ending Our Forebearers' Forbearances: FIRREA and Supervisory Goodwill*, 2 Stan. L. & Pol'y Rev. 102, 104-105 (1990).

[21] The court of appeals' conclusory statement that the clause referred only to "the law as it existed at the time the contract was entered into," Pet. App. 23a, turns the unmistakability doctrine on its head. See also *id.* at 23a-24a ("[T]he clause clearly is not an escape hatch that allows the federal government to avoid performance of its contractual obligations without penalty by passing a law prohibiting its own performance"). Instead of favoring the interpretation of the contract that preserves the sovereign's regulatory authority, the court of appeals' conclusory statement does just the opposite.

an Assistance Agreement with Winstar in connection with Winstar's acquisition of a failing thrift in 1983. The Agreement required FSLIC to contribute capital (which eventually amounted to $5.5 million, see Pet. App. 194a, J.A. 97-98) to the resulting institution. It also contained a number of provisions requiring Winstar to take various steps to protect the federal investment, such as vigorously pursuing claims of the acquired thrift. See J.A. 102-105. The Federal Circuit correctly noted that "Winstar's Assistance Agreement, like Glendale's SAA, did not directly cover the treatment of supervisory goodwill." Pet. App. 27a. But the Federal Circuit held that, as in Glendale, the Assistance Agreement contained an integration clause that incorporated a forbearance letter from the Bank Board and a Bank Board Resolution. *Id.* at 27a-28a. The Federal Circuit held that those documents, in turn, included promises by the then-thrift regulators to permit Winstar to count supervisory goodwill resulting from the merger as capital for purposes of meeting federal capital requirements for a period of 35 years. See *id.* at 28a.

The Federal Circuit's conclusion with respect to Winstar is wrong for the same reasons that its conclusion with respect to Glendale is wrong. The integration clause did not make the forbearance letter and Bank Board Resolution into contractual promises that Winstar could continue to capitalize goodwill in the future, even if regulatory policy or the governing statute should change. Those documents reflected then-current regulatory policy and stated the steps Winstar needed to take to capitalize goodwill—and the amortization schedule that could be used in doing so—under that policy.[22]

---

[22] Winstar's integration clause was virtually identical to Glendale's. Compare J.A. 112 (Winstar) with J.A. 598-599 (Glendale). The forbearance letter that the Bank Board sent to Winstar provided, in relevant part:

> For purposes of reporting to the Board, the value of any intangible assets resulting from accounting for the merger in

Winstar has argued that the "accounting principles" clause in its Assistance Agreement, J.A. 108-109, had the effect of contractually committing the government to use the Bank Board Resolution—rather than any future regulations—to govern accounting for the transaction. See Winstar Br. in Opp. 24-25. Winstar's argument is not persuasive, and it was not relied upon by the Federal Circuit. Indeed, the language of that clause, insofar as it has any relevance to this case, supports the government's position.

The accounting principles clause by its own terms applied only to "any computations made for the purposes of this Agreement." J.A. 108. As argued above, the

---

accordance with the purchase method may be amortized by [Winstar] over a period not to exceed 35 years by the straight-line method.

J.A. 123; see also Pet. App. 28a. That statement is very similar to the language of the Glendale Bank Board Resolution requiring Glendale to "determine[] and amortize[]" goodwill in accordance with the schedule in a previous Board Resolution. See *id.* at 19a & n.4. As in *Glendale*, the statement in the Winstar Resolution includes no reference to federal capital requirements, and it does not purport to impose an obligation on the federal government. See pp. 25-26, *supra*.

The Bank Board Resolution with regard to the Winstar transaction provided, in relevant part:

> [Winstar] shall furnish an analysis, accompanied by a concurring opinion from its independent public accountants, satisfactory to the Supervisory Agent and to the Office of Examinations and Supervision, which (i) specifically describes as of the closing date, any intangible assets, including goodwill or the discounts and premiums arising from the acquisition to be recorded on [Winstar's] consolidated books; and (ii) substantiates the reasonableness and conformity with regulatory requirements of the amounts attributed to intangible assets, including goodwill, and the discounts and premiums and the related amortization periods and methods.

J.A. 76. The operative language in that provision, again, is almost identical to the operative language in the corresponding provision of the Glendale Bank Board Resolution. See pp. 25-26, *supra*. The Glendale analysis applies equally to Winstar.

Agreement contained no provision relating to supervisory goodwill or capital requirements (which, as the Federal Circuit recognized (Pet. App. 27a), were discussed only in the forbearance letter and Bank Board Resolution). Accordingly, no computations regarding goodwill or capital requirements had to be or were "made for the purposes of this Agreement." Moreover, the portion of the clause upon which Winstar relies has to do with what occurs "[i]n the case of any ambiguity in the interpretation or construction of any provision of this Agreement." J.A. 109. There was, however, no ambiguity in any provision of the Agreement regarding supervisory goodwill, since the Agreement did not mention that subject. Finally, the sentence on which Winstar relies states:

> For the purposes of this section, the governing regulations and the accounting principles shall be those in effect on the Effective Date or as subsequently clarified, interpreted, or amended by the Bank Board or the Financial Accounting Standards Board ("FASB"), respectively, or any successor organization.

J.A. 109. That sentence recognizes that the "governing regulations and the accounting principles" will be those in effect at the time of the transaction "or as subsequently clarified, interpreted, or amended by the Bank Board" or other authorities. It thus strongly supports our argument that the parties recognized that Bank Board policies could change, and that whatever new policies were adopted would, from then on, govern future accounting by Winstar.

As with Glendale, there are other provisions in the Winstar Assistance Agreement that demonstrate the parties' understanding that Bank Board policies could change, especially if Congress enacted legislation requiring such changes. As in *Glendale*, the agreement provided that "[n]othing in this Agreement shall require any unlawful action or inaction by either party." J.A. 112. The Bank Board Resolution made the same point; it required Win-

star to file a "Net Worth Maintenance Stipulation" reciting that Winstar would comply with capital regulations "as now *or hereafter* in effect." J.A. 78 (emphasis added). Thus, the Resolution contemplated that regulatory capitalization requirements might be changed, and Winstar pledged to comply with those changes.

Finally, the Winstar Agreement provided that, "[e]xcept as otherwise specifically provided in this Agreement, this Agreement shall terminate [in 1986]." J.A. 110. Thus, even if the agreement had placed an obligation on the government to permit the inclusion of goodwill in Winstar's regulatory capital, that obligation would have expired prior to the enactment of FIRREA.

c. *Statesman*

Unlike Glendale and Winstar, Statesman has alleged that it entered into a contract that bound the federal government to permit it to count two distinct forms of goodwill—supervisory goodwill and capital credits (RAP goodwill)—as regulatory capital for purposes of satisfying federal capital requirements.

In 1987, Statesman acquired four failing thrifts. The Statesman transaction regarding supervisory goodwill is in relevant respects like the Winstar transaction, and calls for the same analysis. In connection with Statesman's acquisition of the four failing thrifts, it entered into a 1988 Assistance Agreement with FSLIC; that Agreement contained nothing about supervisory goodwill or federal capital requirements. The Statesman Assistance Agreement included an integration clause that differed somewhat from that in the Glendale and Winstar contracts; after providing that "[t]his Agreement, *together with any resolutions adopted by the Bank Board* * * * constitutes the entire agreement between the parties," it continued with language similar to that in the other transactions. See J.A. 408 (emphasis added). With respect to supervisory goodwill, the Bank Board Resolution included

language similar to that in Glendale and Winstar.[23] The Federal Circuit relied on that language to reach the same result it did with respect to Glendale and Winstar. Pet. App. 25a-26a.

As in Glendale and Winstar, the Bank Board Resolution referred to in the Agreement's integration clause made no promises concerning the continued application of existing federal capital requirements to Statesman's supervisory goodwill; the Resolution merely stated the requirements for Statesman to capitalize goodwill under then-current regulatory capital policy. Accordingly, the Agree-

[23] The Bank Board Resolution provided, in relevant part:

> [T]he Acquisition and the Mergers shall be accounted for, and [Statesman] shall report to the Bank Board and the FSLIC, in accordance with generally accepted accounting principles prevailing in the savings and loan industry, as accepted, modified, clarified, or interpreted by applicable regulations of the Bank Board and the FSLIC, except to the extent of the following departures from generally accepted accounting principles:
>
> (a) Twenty-one million dollars of the initial contribution by the [FSLIC] to [Statesman], and five million dollars of the principal amount of the Subordinated Debenture issued to the FSLIC, pursuant to § 6 of the Assistance Agreement, shall be credited to the regulatory capital account of [Statesman]; and
>
> (b) The value of any unidentifiable intangible assets resulting from accounting for the Acquisition and the Mergers in accordance with the purchase method of accounting may be amortized by [Statesman] over a period not in excess of twenty-five (25) years by the straight line method.

J.A. 458-459; see also Pet. App. 25a-26a. Clause (a) mirrors the language of the Assistance Agreement regarding Statesman's capital credits, see p. 34, *infra*; clause (b) concerns supervisory goodwill, and is almost identical to the corresponding clauses in the Glendale and Winstar transactions.

As with Glendale and Winstar, the Resolution also required Statesman to submit an accountant's report describing the goodwill resulting from the acquisitions that Statesman carried on its books and "substantiat[ing] the reasonableness and conformity with regulatory requirements of the amounts attributed to intangible assets, including goodwill * * *, and the related amortization periods and methods." J.A. 459; see also Pet. App. 26a.

ment cannot be construed to include a commitment to permit Statesman to count its supervisory goodwill as capital for purposes of satisfying federal capital requirements for the 25-year amortization period, despite subsequent changes in the law.

Pursuant to Statesman's Assistance Agreement, FSLIC contributed some $60 million to Statesman Bank. J.A. 362. The Agreement provided that $26 million of the FSLIC contribution could also be counted as capital for purposes of satisfying federal capitalization requirements. The Agreement stated:

> For purposes of reports to the Bank Board * * *, $26 million of the contribution [made by FSLIC] shall be credited to [Stateman's] regulatory capital account and shall constitute regulatory capital (as defined in § 561.13 of the Insurance Regulations).

J.A. 362a. Unlike the provisions in various documents relied on by Glendale and Winstar, that provision mentions Statesman's "regulatory capital account," and it states that the capital credit "shall constitute regulatory capital." In addition, it states a commitment by *both* parties as to how capital is to be calculated, rather than a requirement placed only on the thrift, as in Winstar and Glendale. It therefore demonstrates that the parties to these transactions could formulate contractual commitments regarding regulatory treatment of intangible assets, and that they did so when that was their intention.

The Statesman capital credit clause, however, also makes clear that the regulatory commitment it made would not survive a change in regulatory policy. The statement that the capital credit "shall constitute regulatory capital (*as defined in § 561.13 of the Insurance Regulations*)"—a reference to 12 C.F.R. 561.13 (1988)[24] —demonstrates the parties' understanding that treatment

[24] That regulation defined what constituted regulatory capital of a thrift institution. It was modified from time to time, and the most recent amendments had been promulgated on January 6, 1988, about two months prior to the Statesman transaction. 53 Fed. Reg. 334 (1988).

of the capital credit as an asset depended entirely upon existing regulations and that the same treatment would not necessarily be accorded if changes were made in the governing regulations or statute.[25]

In addition, other provisions of the Statesman Agreement operated expressly to allocate the risk of a change in the governing law to Statesman. The Statesman Assistance Agreement contained the same governing law provision as in *Glendale* and *Winstar*, providing that "[n]othing in this Agreement shall require any unlawful action or inaction by either party." J.A. 408. Once FIRREA was passed, a contract right obliging OTS to continue to count Statesman's capital credit as regulatory capital would have required OTS to act unlawfully. The Agreement also included a provision requiring Statesman to "comply in all material respects with all applicable statutes, regulations, orders of, and restrictions imposed by the United States or * * * by any agency of [the United States]," J.A. 407,[26] and therefore independently

[25] The Statesman Assistance Agreement provided that "this Agreement shall terminate five (5) years following the Effective Date," or March 11, 1993. J.A. 405. In our view, therefore, any promise regarding Statesman's capital credit would thus have terminated in 1993.

[26] The provision stated that:

> [Statesman] shall, and shall cause its subsidiaries, Affiliates, and service corporations to, comply in all material respects with all applicable statutes, regulations, orders of, and restrictions imposed by the United States or any state, municipality, or other political subdivision, or by any agency of the foregoing public units, regarding the ownership of its properties and conduct of its business, including, without limitation, all applicable statutes, regulations, orders, and restrictions relating to equal employment opportunities, employment retirement income security, and environmental standards and controls; *provided*, however, that nothing contained in this [section] shall require [Statesman], or any of its subsidiaries, Affiliates, or service corporations, to comply with any law so long as the applicability thereof shall be contested in good faith.

J.A. 407.

required Statesman to comply with FIRREA's capital requirements.

6. We have demonstrated above that the contracts at issue in this case did not purport to make any promises by the government concerning whether supervisory goodwill would continue to be treated as regulatory capital in the future. Under ordinary principles of contract interpretation, that would be sufficient to establish that no such promises were made. It follows, *a fortiori*, that no such promises were made unmistakably in the documents at issue in this case.[27]

II. THE RELEVANT FEDERAL AGENCIES HAD NO AUTHORITY TO BIND THEIR SUCCESSORS TO PARTICULAR REGULATORY POLICIES DESPITE SUBSEQUENT LEGISLATIVE CHANGES

The Federal Circuit's theory was that the former thrift regulators entered into contracts that committed the federal government to count respondents' goodwill as capital for periods of 25 to 40 years (or, in the case of Statesman's capital credits, perhaps permanently), and that those contracts remained fully valid and enforceable even after legislation made that treatment of capital illegal. In other words, the contracts either committed Congress not to enact new legislation requiring a different treatment of respondents' capital or granted respondents a prospective immunity from any such legislative change.

This Court has never held that a federal agency has the authority to enter into an agreement that binds future Congresses not to change regulatory schemes or that immunizes private parties from the effects of such changes. Even if an agency in some circumstances could make such an agreement, however, it certainly could not do so without an express delegation of authority from Congress.

[27] That is especially true in the present context. See *Transohio*, 967 F.2d at 619-620 (court may not "compensate for the absence of an unmistakable waiver given that * * * the transaction was heavily lawyered and * * * extensively negotiated").

There was no such delegation here. Thus, even if respondents had received unmistakable promises that capital requirements would not change—which they did not—such promises would be invalid and unenforceable.

1. In what has become known as the "reserved powers" doctrine, this Court has frequently held that state legislatures may not contract away essential attributes of sovereignty. For example, in *Stone* v. *Mississippi*, 101 U.S. 814 (1880), plaintiff corporation, after paying a monetary premium for the privilege, see *id.* at 817-818, obtained a charter from the state legislature permitting it to conduct lotteries;[28] plaintiff then claimed that the charter immunized it from a state statute, enacted one year later, that outlawed lotteries. The Court rejected that claim, holding that "the legislature cannot bargain away the police power of a State." *Id.* at 817. The Court explained that

> the power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must "vary with varying circumstances."

Id. at 820. Accordingly, "[a]ll that one can get by a [contract purporting to alienate a reserved power] is a suspension of certain governmental rights in his favor,

[28] A state-granted charter is a contract. *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 627 (1819). See also *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 435 (1934).

subject to withdrawal at will." *Id.* at 821.[29] As the Court stated in *Atlantic Coast Line R.R.* v. *City of Goldsboro*, 232 U.S. 548, 558 (1914), "the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community * * * can neither be abdicated nor bargained away, and is inalienable even by express grant."

The reserved powers doctrine was developed in the context of Contract Clause challenges to actions by the States. The logic of the doctrine, however, applies equally to contracts alleged to have been made by the federal government. At least with respect to the exercise of sovereign regulatory authority, a particular Congress, like a state legislature, cannot take actions that tie the hands of its successors. "[G]overnmental [regulatory] powers cannot be contracted away." *North American Commercial Co.* v. *United States*, 171 U.S. 110, 137 (1898).[30] This doctrine precludes any interpretation of

---

[29] Numerous cases of this Court have relied on the reserved powers doctrine to hold that purported alienations of sovereign authority—generally by a legislature—are invalid. See, *e.g.*, *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 23 (1977) (dicta) ("[T]he Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty"); *Pierce Oil Corp.* v. *City of Hope*, 248 U.S. 498, 501 (1919) (dicta); *Contributors to the Pennsylvania Hosp.* v. *City of Philadelphia*, 245 U.S. 20, 23 (1917); *Douglas* v. *Kentucky*, 168 U.S. 488, 502-503 (1897); *Butchers' Union Slaughter-House & Live-Stock Landing Co.* v. *Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746, 750-751 (1884). See also *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. at 434-444.

[30] See also *Lynch* v. *United States*, 292 U.S. 571, 579 (1934) ("As Congress had the power to authorize the Bureau of War Risk Insurance to issue [insurance contracts], the due process clause prohibits the United States from annulling them, *unless, indeed, the action taken falls within the federal police power or some other paramount power.*") (emphasis added).

the contracts in this case that would grant respondents the future right to violate capitalization standards imposed by Congress.

2. It need not be decided in this case, however, whether the authority to alter capital requirements to ensure the safety of thrift institutions is a "reserved power" of Congress that may not be contracted away. Cf. *Jefferson Branch Bank* v. *Skelly*, 66 U.S. (1 Black) 436 (1862) (requiring State not to impair obligation of contract granting partial exemption from tax). Given the serious consequences of a limitation on future legislative authority in this area, a federal agency may certainly not bind a future Congress without an express delegation of authority from Congress to do so. Congress, however, never granted federal thrift regulators the power to contract for the limitation of its authority over thrift capitalization requirements. See *Transohio Savings Bank* v. *Director, OTS*, 967 F.2d 598, 621 (D.C. Cir. 1992); cf. *Peterson* v. *United States Dep't of the Interior*, 899 F.2d 799, 811 n.17, 813 n.18 (9th Cir.), cert. denied, 498 U.S. 1003 (1990).

The requirement that a delegation of authority to make contracts limiting legislative regulatory power must be stated expressly and clearly is confirmed by this Court's decision in *Home Tel. & Tel. Co.* v. *City of Los Angeles*, 211 U.S. 265 (1908). In that case, the City of Los Angeles had granted a charter to a telephone company specifying certain maximum prices that the company could charge. *Id.* at 272. The city later attempted to regulate the prices further, and the company brought suit, claiming that the new price regulations violated the Contract Clause. This Court held that the company's claim depended upon a showing that the "city council has the power to enter into a contract fixing, unalterably, during the term of the franchise, charges for telephone service and disabling itself from exercising the charter power of regulation." *Id.* at 272-273. In connection

with determining whether a showing of such a delegation was made, the Court stated:

> The surrender, by contract, of a power of government, though in certain well-defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, *as well as the authority to make it*, must be closely scrutinized. No other body than the supreme legislature (in this case, the legislature of the State) has the authority to make such a surrender, unless the authority *is clearly delegated to it by the supreme legislature*. The general powers of a municipality or of any other political subdivision of the State are not sufficient. *Specific authority for that purpose is required.*

Id. at 273 (emphasis added).[31] Those principles are directly applicable to this case.[32]

No specific congressional delegation of authority to enter into contracts limiting Congress's future regulatory power is present in this case. In holding that the federal thrift regulators had the authority to make contracts granting respondents the rights they claim, the court of appeals relied (Pet. App. 39a) on statutes generally granting FSLIC and the Bank Board the power "[t]o make contracts," 12 U.S.C. 1725(c)(3) (1988) (repealed),

[31] The Court added that the effect of the City's contract with the telephone company "is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates." 211 U.S. at 273. In language directly applicable to this case, the Court then stated that, "for the very reason that such a contract has the effect of extinguishing *pro tanto* an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power." *Ibid.*

[32] These principles have been referred to as the "vertical dimension" of the unmistakability doctrine. See David Toscano, Note, *Forbearance Agreements: Invalid Contracts for the Surrender of Sovereignty*, 92 Colum. L. Rev. 426, 464 (1992). See also *Home Tel. & Tel.*, 211 U.S. at 276 ("The decisions of this court * * * where a contract of this kind was found and enforced, all show *unmistakably* legislative authority to enter into the contract.") (emphasis added).

to extend assistance to acquirers of insolvent federally insured thrifts, 12 U.S.C. 1729(f)(2)(A) (1988) (repealed), and the agencies' authority to set minimum capital requirements on a case-by-case basis.[33] The cited provisions, however, do not provide even a hint that Congress intended to grant FSLIC or the Bank Board the authority to commit Congress not to modify the governing statutes, or to immunize particular thrifts from the effects of statutory changes for periods of 25 to 40 years or more.

3. Respondents assert that this Court's decisions in *Lynch* v. *United States*, 292 U.S. 571 (1934), and *Perry* v. *United States*, 294 U.S. 330, 350 (1935), support their argument. See Glendale Br. in Opp. 19-20. That contention is mistaken.

Lynch and *Perry* involved government efforts to renege on purely financial contractual obligations—government-issued life insurance contracts in *Lynch*, the obligation to repay government bonds in gold in *Perry*. Such contracts do not limit the government's authority to regulate the conduct of private parties or entities for the public good. See *Lynch*, 292 U.S. at 580 (no suggestion that Congress "abrogate[d] these contracts in the exercise of the police or any other power").[34] See also David Toscano, Note, *Forbearance Agreements: Invalid Contracts for the Surrender of Sovereignty*, 92 Colum. L. Rev. 426, 455-456 (1992).

[33] The Court of Federal Claims also relied (Pet. App. 147a) upon statutory language providing that FSLIC could "in its sole discretion and upon such terms and conditions as [FSLIC] may prescribe" guarantee a thrift against loss from a merger. See 12 U.S.C. 1729(f)(2)(A) (1988) (repealed). But that section merely served to exempt such FSLIC determinations from review under the Administrative Procedure Act (5 U.S.C. 701(a)(2)); it did not delegate to FSLIC the authority to make contracts limiting Congress's power to impose regulations on all thrifts.

[34] Cf. *POSSE*, 477 U.S. at 55 ("Congress does not have the power to repudiate its own debts, which constitute 'property' to the lender, simply in order to save money.").

Lynch and *Perry* also illustrate the point that a general grant of the power to make contracts to an administrative agency is insufficient to grant the agency the authority to make contracts in derogation of the power of Congress to modify the law. *Lynch*, for example, involved "a policy for yearly renewable term insurance issued during the World War pursuant to the War Risk Insurance Act." 292 U.S. at 574 (footnote omitted). *Perry* involved a bond "issued pursuant to the Act of September 24, 1917." 294 U.S. at 346. As the Court's opinions in both cases make clear, the statutes at issue expressly authorized the relevant authorities, in the clearest possible terms, to enter into the precise kinds of contracts upon which the plaintiffs there relied. See, *e.g.*, *Perry*, 294 U.S. at 348 ("The terms of the bond are explicit. They were not only expressed in the bond itself, but they were definitely prescribed by the Congress."). The delegations of general contracting authority on which respondents and the Federal Circuit relied here do not remotely satisfy that standard.

4. As this Court has stated, "anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384 (1947). Thus, even if respondents had obtained the promises they allege from the federal officials who allegedly made them, those promises would be unenforceable. In comparable circumstances, this Court has made clear that a party relying on the authority of a government agent may have his expectations disappointed. See *OPM* v. *Richmond*, 496 U.S. 414 (1990).

5. It is important to note that our position does not mean that the agreements that *were* made between respondents and the federal regulatory agencies were illusory or of little worth. The thrifts received substantial benefits from those agreements, even in light of the later changes made by FIRREA. They all obtained the benefits of the Bank Board policy permitting them to count goodwill as capital for the period during which that policy was in effect—*i.e.*, until FIRREA was enacted, eight years after the Glendale transaction, five years after the Winstar transaction, and nearly two years after the Statesman transaction. In Winstar and Statesman, the thrifts also received substantial infusions of federal cash and access to new markets. See note 5, *supra*. In Glendale, the thrift got an express commitment for protection from rising interest rates for four years, at a time when the thrift industry was under siege by "unprecedented high interest rates," J.A. 550, 591-593; ten years of indemnification against the unknown liabilities of Broward, J.A. 593-594; and a variety of short-term cash advances, J.A. 596-598. In addition, Glendale obtained access to new and potentially very lucrative markets in Florida, one of the top five thrift markets in the country. See J.A. 551.

III. RESPONDENTS' CLAIM FOR BREACH OF CONTRACT DAMAGES IS ALSO PRECLUDED BY THE SOVEREIGN ACTS DOCTRINE

1. This Court long ago held that "[w]hatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to * * * violate the particular contracts into which it enters with private persons." *Horowitz* v. *United States*, 267 U.S. 458, 461 (1925). That has come to be known as the sovereign acts doctrine. Where the alleged breach of contract by the government resulted from a "public and general" act, the government is immune from liability for breach of contract.

2. The sovereign acts doctrine is based on a principle of equality between the government and private contractors. See Pet. App. 40a (the "doctrine is intended to level the playing field between the government and its contractors"). Under ordinary principles of contract law, a party's duty to render performance is discharged when an intervening action by the sovereign, such as enactment

of a statute, precludes performance. See, *e.g.*, 6 *Corbin on Contracts* § 1343, at 417 (1962) (when performance is prevented by intervening legislation, "there is no question that the duty of the party whose performance is thus prevented is discharged"). See also Restatement (Second) Contracts §§ 261, 262. The sovereign acts doctrine applies the same rule to the government as contractor. Where a performance of a contract made by a government agency is rendered impossible by a subsequent federal statute or other action that is a public and general act, performance of the contract by the agency is excused. The primary qualification on the doctrine is that the sovereign act relied upon to excuse performance be a "public and general" one. If it is not—if the sovereign act merely enables the government to evade its particular contractual obligations—then the rationale of the doctrine does not apply and the government's breach is actionable.

3. Thus, even if respondents had the contract rights that they claim, the United States would not be liable for contract damages if the governmental act that caused the breach of those rights was "public and general," and not taken merely to avoid contractual obligations to a particular party. See, *e.g.*, *Deming* v. *United States*, 1 Ct. Cl. 190, 191 (1865), appeal dismissed, 76 U.S. (9 Wall.) 145 (1870); *Atlas Corp.* v. *United States*, 895 F.2d 745, 754-755 (Fed. Cir.), cert. denied, 498 U.S. 811 (1990); *Tony Downs Foods Co.* v. *United States*, 530 F.2d 367 (Ct. Cl. 1976); *Amino Brothers Co.* v. *United States*, 372 F.2d 485, 491 (Ct. Cl.), cert. denied, 389 U.S. 846 (1967). The statutory provisions of FIRREA that plaintiffs challenge in this case were such "public and general" acts.

FIRREA as a whole is plainly a "public and general" statute. It instituted a comprehensive overhaul of the regulation of the entire thrift industry, for the protection of depositors nationwide and in order to promote the general welfare. Moreover, even the specific provisions of FIRREA imposing new capital requirements did not merely affect alleged contractual commitments from the regulatory agencies permitting thrifts to count goodwill as capital for purposes of meeting whatever federal capital requirements might be in effect. These new provisions regulating the use of goodwill were general ones, sharply curtailing the ability of *any* thrift, as of the effective date of FIRREA, to count most intangible assets as capital, regardless of whether those assets had ever been at issue in any arrangement with federal regulators.

The relevant question in determining whether a legislative action is a "public and general act" under the sovereign acts doctrine is not whether a particular party is affected by the governmental action at issue; it is whether the impact on a particular party or parties is caused by a law enacted to govern regulatory policy and to advance the general welfare. The FIRREA provisions involved in this case satisfy that standard. The sovereign acts doctrine accordingly would preclude liability for breach of contract here even if the alleged agreements upon which respondents rely had been included in their contracts with the federal agencies.

4. The Federal Circuit found the sovereign acts doctrine inapplicable because "the relevant sections of FIRREA are not public and general sovereign acts." Pet. App. 39a. In the court's view, that conclusion follows because provisions of FIRREA specifically refer to supervisory goodwill. Because of those provisions, the court concluded that FIRREA's new regulations of capital constituted legislation that is not "public and general" but whose "principal effect is to abrogate specific contractual rights." *Id.* at 40a.

The FIRREA "transition rule[s]," Pet. App. 42a, on which the court of appeals relied make limited exceptions to some of FIRREA's restrictions on the use of intangible assets for thrifts with supervisory goodwill, including thrifts in respondents' position. As the Federal Circuit recognized, these rules were designed to place respondents in a *better* position than other thrifts and in a better

position than they would have been had no such exceptions been made: "The statute plainly singles out supervisory goodwill for special treatment, *albeit treatment less harsh than other forms of intangible assets.*" *Ibid.* (emphasis added). Congress thus meant to soften the impact of the new capital requirements on thrifts that had entered into mergers or acquisitions during the crisis in the thrift industry. The fact that transition rules in the statute granted respondents a partial exception from more generally applicable restrictions—an exception that did not have to be granted—could not possibly mean that the restrictions themselves, insofar as they continued to apply to respondents, were not "public and general acts."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

JAMES A. FELDMAN
Assistant to the Solicitor General

DOUGLAS LETTER
JACOB M. LEWIS
SCOTT R. MCINTOSH
Attorneys

MARCH 1996

☆ U. S. GOVERNMENT PRINTING OFFICE: 1996 405017 40080

Supreme Court, U.S.
FILED
MAR 29 1996

No. 95-855

In The
Supreme Court of the United States
October Term, 1995

UNITED STATES OF AMERICA,
Petitioner,
v.
WINSTAR CORPORATION, et al.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

BRIEF FOR RESPONDENTS WINSTAR CORPORATION AND THE STATESMAN GROUP, INC., ET AL.

CHARLES J. COOPER
Counsel of Record
MICHAEL A. CARVIN
ROBERT J. CYNKAR
VINCENT J. COLATRIANO
SHAW, PITTMAN, POTTS
& TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

COPY

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the federal government can deliberately repudiate, without liability, specifically negotiated, unambiguous, and express contractual commitments for which it has received valuable consideration simply by changing the law.

PARTIES BELOW

The parties to the proceeding in the court whose judgment is under review were Winstar Corporation, United Federal Savings Bank, Statesman Savings Holding Corp., The Statesman Group, Inc., and American Life and Casualty Insurance Company.

Respondents have already provided the Court, in their brief in opposition to the government's petition for writ of certiorari, with the information required under Rule 29.6 of the Rules of this Court.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

STATEMENT 1

INTRODUCTION AND SUMMARY OF ARGUMENT ... 13

ARGUMENT 18

I. THE GOVERNMENT UNMISTAKABLY AGREED TO ACCORD REGULATORY CAPITAL TREATMENT TO RESPONDENTS' SUPERVISORY GOODWILL AND CAPITAL CREDIT FOR SPECIFIED TIME PERIODS ... 18

II. THE THRIFT REGULATORS HAD EXPRESS STATUTORY AUTHORITY TO ENTER INTO STATESMAN'S AND WINSTAR'S CONTRACTS 41

III. THE SOVEREIGN ACTS DOCTRINE DOES NOT EXCUSE THE GOVERNMENT'S LIABILITY IN DAMAGES FOR ITS BREACH OF ITS CONTRACTUAL OBLIGATIONS 42

CONCLUSION 50

TABLE OF AUTHORITIES

CASES — Page

Amino Bros. Co. v. United States, 372 F.2d 485 (Ct. Cl.), *cert. denied*, 389 U.S. 846 (1967) 46

Appleby v. Delaney, 271 U.S. 403 (1926) 18

Armstrong v. United States, 364 U.S. 40 (1960) 37

Bowen v. Public Agencies Opposed to Social Sec. Entrapment, 477 U.S. 41 (1986) 11, 33, 34

Bradley v. Washington, Alexandria, and Georgetown Steam Packet Co., 38 U.S. (13 Pet.) 89 (1839) 18

Carteret Sav. Bank v. OTS, 762 F. Supp. 1159 (D.N.J. 1991), *vacated on other grounds*, 963 F.2d 567 (3d Cir. 1992) 21

Charter Fed. Sav. Bank v. OTS, 976 F.2d 203 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 1643 (1993) 35

Choate v. Trapp, 224 U.S. 665 (1912) 40

Craft Machine Works, Inc. v. United States, 926 F.2d 1110 (Fed. Cir. 1991) 22

Energy Reserves Group v. Kansas Power & Light Co., 459 U.S. 400 (1983) 38

Far West Fed. Bank v. Director, OTS, 787 F. Supp. 952 (D. Or. 1992) 20

Freedman v. United States, 320 F.2d 359 (Ct. Cl. 1963) 44

Globe Refining Co. v. Landa Cotton Oil Co., 190 U.S. 540 (1903) 16

Guaranty Fin. Serv., Inc. v. Ryan, 928 F.2d 994 (11th Cir. 1991) 35

TABLE OF AUTHORITIES – Continued

CASES — Page

Hansen Sav. Bank v. OTS, 758 F. Supp. 240 (D.N.J. 1991) 21

Heil v. United States, 273 F. 729 (S.D.N.Y. 1921) ... 13, 42

Hills Materials Co. v. Rice, 982 F.2d 514 (Fed. Cir. 1992) 18, 22, 44, 46

Hodel v. Irving, 481 U.S. 704 (1987) 40

Horowitz v. United States, 267 U.S. 458 (1925) 43, 44, 45

Hughes Communications Galaxy Inc. v. United States, 998 F.2d 953 (Fed. Cir. 1993) 22

Jefferson Branch Bank v. Skelly, 66 U.S. (1 Black) 436 (1861) 32, 33

Jones v. United States, 1 Ct. Cl. 383 (1865) 45

Lynch v. United States, 292 U.S. 571 (1934) 32, 40, 45, 46

Manigault v. Springs, 199 U.S. 473 (1905) 15

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 33, 34

New York Mail & Newspaper Transp. Co. v. United States, 154 F. Supp. 271 (Ct. Cl), *cert. denied*, 355 U.S. 904 (1957) 49

Ocean Technology, Inc. v. United States, 19 Cl. Ct. 288 (1990) 49

Perry v. United States, 294 U.S. 330 (1935) ..... *passim*

Piqua Branch v. Knoop, 57 U.S. (16 How) 369 (1854) 33

Prestex Inc. v. United States, 320 F.2d 367 (Ct. Cl. 1963) 49

TABLE OF AUTHORITIES – Continued

CASES

	Page
Providence Bank v. Billings, 29 U.S. (4 Pet.) 514 (1830)	32, 33
RTC v. FSLIC, 25 F.3d 1493 (10th Cir. 1994)	20, 28
Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984)	40
Russell v. Sebastian, 233 U.S. 195 (1914)	18
Security Fed. Sav. Bank v. Director, OTS, 747 F. Supp. 656 (N.D. Fla. 1990)	21
Security Sav. & Loan Ass'n v. Director, OTS, 761 F. Supp. 1277 (S.D. Miss. 1991), *aff'd in part, rev'd in part on other grounds*, 960 F.2d 1318 (5th Cir. 1992)	21
Sinking Fund Cases, 99 U.S. (9 Otto) 700 (1879)	32
Sterling Sav. Ass'n v. Ryan, 751 F. Supp. 871 (E.D. Wash. 1990), *rev'd on other grounds*, 959 F.2d 241 (9th Cir. 1992)	21
Sunswick Corp. v. United States, 75 F. Supp. 221 (Ct. Cl.), *cert. denied*, 334 U.S. 827 (1948)	47
Transcapital Fin. Corp. v. Director, OTS, 44 F.3d 1023 (D.C. Cir. 1995)	35
Transohio Sav. Bank v. Director, OTS, 967 F.2d 598 (D.C. Cir. 1992)	35
The Binghamton Bridge Co., 70 U.S. (3 Wall.) 51 (1886)	18, 35
United States v. Amdahl Corp., 786 F.2d 387 (Fed. Cir. 1986)	49
United States v. Cherokee Nation, 480 U.S. 700 (1987)	33, 34
United States v. Klein, 80 U.S. (1 Wall.) 128 (1871)	32

TABLE OF AUTHORITIES – Continued

CASES

	Page
United States Trust Co. v. New Jersey, 431 U.S. 1 (1977)	15, 38, 43
Van Hoffman v. Quincy, 71 U.S. (4 Wall.) 535 (1867)	22
Wood v. Lovett, 313 U.S. 362 (1941)	22
Yosemite Park & Curry Co. v. United States, 582 F.2d 552 (Ct. Cl. 1978)	49

STATUTES

12 U.S.C. § 1464	1
12 U.S.C. § 1725(d) (1988)	42
12 U.S.C. § 1729(f)(2)(A)(3) (1988)	42

OTHER AUTHORITIES

135 Cong. Rec. 11,795 (1989)	39
135 Cong. Rec. H2706 (daily ed. June 15, 1989)	41
Comptroller General Op. B-240860 (Aug. 27, 1990)	41
E. Allan Farnsorth, *Contracts* 840 (2d ed. 1990)	16
H.R. Rep. No. 54, 101st Cong. 1st Sess., pt. 1, at 298-99 (1989)	41
Housing and Urban Recovery Act of 1982: Hearing Before the Subcommittee on Housing and Community Development of the House Committee on Banking Finance and Urban Affairs, 97th Cong., 2d Sess. 1490 (Mar. 24, 1982)	3

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES — Page

Michael L. Zigler, Note, *Takings Law and the Contract Clause: A Takings Law Approach to Legislative Modifications of Public Contracts*, 36 Stan. L. Rev. 1447 (1984) 15

Oversight on the Condition of the Financial Services Industry: Hearings Before The Senate Comm. on Banking, Housing, and Urban Affairs, 100th Cong., 2d Sess. 356 (1988) 6

Recent Cases, 109 Haw. L. Rev. 1162 (1996) 48

Restatement (Second) of Contracts (1981) 16, 18

S. Rep. No. 19, 101st Cong., 1st Sess. 9 (1989) 5

Savings and Loan Policies in the Late 1970s and 1980s: Hearings Before The House Comm. on Banking, Finance, and Urban Affairs, 101st Cong., 2nd Sess. 176 (1990) 5

BRIEF FOR RESPONDENTS WINSTAR CORPORATION AND THE STATESMAN GROUP, INC., ET AL.

This case is actually three separate cases, consolidated by the Court of Federal Claims for purposes of an interlocutory appeal of the court's order granting plaintiffs' (respondents here) motions for partial summary judgment as to liability on their claims of breach of contract. Pet. App. 150a-152a. This brief is filed on behalf of the respondents in two of the consolidated cases – Winstar Corporation ("Winstar") and The Statesman Group, Inc., and its affiliated entities (collectively "Statesman"). Respondent in the third consolidated case, Glendale Federal Bank, FSB, is represented by separate counsel and is filing its own brief.

STATEMENT

In upholding the trial court's finding of contract liability against the government, a nine-judge majority of the *en banc* Federal Circuit concluded that "[t]here is nothing extraordinary about the contracts in these cases save for their subject matter and the potential liability to the government." Pet. App. 45a. Applying straightforward and venerable principles of contract law, the Federal Circuit concluded, as had the trial court, that in acquiring insolvent savings and loan institutions ("thrifts"), respondents had "negotiated contracts with the bank regulatory agencies that allowed them to include supervisory goodwill (and capital credits) as assets for regulatory capital purposes and to amortize that supervisory goodwill over extended periods of time." Pet. App. 30a. Winstar and Statesman fulfilled their obligations under their contracts with the government, but the government did not. Because the thrift regulators, acting pursuant to regulations implementing the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183 (codified in relevant part at 12 U.S.C. § 1464), repudiated their agreements and largely eliminated the bargained-for supervisory goodwill and capital credits from the thrifts' regulatory capital, "Winstar and Statesman were immediately

thrown into noncompliance with the new regulatory capital requirements and were seized by federal regulators within approximately six months." *Id.* The government's repudiation of its agreements with respondents was nothing more, nor less, than an old-fashioned breach of contract, and the only thing remarkable about this case are the arguments advanced by the government to avoid its liability for the damages it has caused to respondents.

Throughout its opening brief, the government casts respondents Winstar and Statesman, and the transactions giving rise to their claims, in a false light. Noting that during the thrift crisis of the 1980s many troubled thrifts sought "to grow rapidly" as "the easiest way to regain profitability," Pet. Br. 2, quoting H.R. Rep. No. 54, 101st Cong., 1st Sess., pt. 1, at 298-99 (1989) ("House Report"), the government portrays respondents Winstar and Statesman as "thrifts [that] engaged in . . . acquisitions of, failing thrifts" and that sought "[i]n connection with their transactions," the Federal Home Loan Bank Board's ("Bank Board") "formal approval" and "valuable government cash and non-cash financial assistance." Pet. Br. 14. The government also attempts to portray the thrift regulators – the Federal Savings and Loan Insurance Corporation ("FSLIC") and the Bank Board – as financially disinterested in the acquisitions, passively providing the necessary "regulatory approval of the Bank Board for the . . . acquisition," Pet. Br. 6, and "permit[ting respondents] to use 'goodwill' to satisfy federal regulatory capital requirements" until FIRREA finally curtailed such "shadowy" accounting "gimmicks." Pet. Br. 4-5.

One would scarcely conclude from a reading of the government's brief that the thrift regulators' commercial interests as the *insurer* of the deposits of the acquired thrifts were vitally at stake in these transactions; that the regulators aggressively urged Winstar and Statesman – neither of which were previously involved in the savings and loan industry – to acquire the insolvent thrifts; that the key inducement, the essential *quid pro quo*, for Statesman's and Winstar's acquisitions was the regulators' express contractual promise to accord regulatory capital treatment to supervisory goodwill

(and Statesman's capital credit) for the specified periods; that the government's use of regulatory capital "forbearances" such as supervisory goodwill to facilitate acquisitions of failed thrifts was designed to (and did) save the *regulators*, not the acquirers, huge sums of money; that the regulators aggressively promoted the use of supervisory goodwill and capital credits because they lacked the cash that would otherwise have been necessary either to liquidate or to facilitate acquisitions of failed thrifts; and that the regulators' transactions with Winstar and Statesman saved the government tens of millions of dollars. The government's account of the transactions giving rise to this case is misleading, and a somewhat extended counter-statement of the case is required to correct it.

1. The causes and extent of the financial crisis in the thrift industry in the 1980s are amply described by the court of appeals in both the panel majority opinion (Pet. App. 57a-61a) and the *en banc* majority opinion (Pet. App. 4a-7a). It suffices here to say that by 1984, when Winstar acquired an insolvent thrift from the FSLIC, hundreds of savings and loan institutions had failed and the FSLIC was *in extremis*. Historically, the FSLIC and the Bank Board had "resolved" failed thrifts either by liquidation or by offering enough cash or other tangible financial assistance to induce a healthy institution or investor to acquire the failed thrift. The cost to the FSLIC insurance fund of facilitating the acquisition of a failed thrift usually ran about 70 percent of the cost of liquidating the thrift.[1] Because of the unprecedented number of thrift failures in the early 1980s, "the FSLIC faced deposit insurance liabilities that threatened to exhaust its insurance fund," Pet. App. 5a, and it was forced to offer favorable regulatory capital forbearances instead of cash and other tangible financial assistance to induce healthy institutions and

---

[1] Housing and Urban Recovery Act of 1982: Hearings Before the Subcommittee on Housing and Community Development of the House Committee on Banking, Finance and Urban Affairs, 97th Cong., 2d Sess. 1490, 1501 (Mar. 24, 1982) (statement of Richard T. Pratt, Chairman, Bank Board) ("Pratt testimony").

private investors to acquire insolvent thrifts.[2] The primary regulatory capital forbearance offered by the regulators was "supervisory goodwill," which was created under the "purchase method" of accounting for a thrift acquisition, and was measured as the amount by which the cost of the acquired thrift (which included any liabilities assumed by the acquirer) exceeded the fair market value of the acquired assets. As the court of appeals explained:

> The Bank Board and the FSLIC allowed the merged thrifts to count this supervisory goodwill toward the minimum regulatory capital requirements and to amortize this goodwill over periods of up to forty years. This permitted the healthy thrift to assume the deposit liabilities of the failing thrift and to maintain capital compliance without having to put up large amounts of its own money and *without requiring large amounts of monetary assistance from the government.*

Pet. App. 6a (emphasis added). The FSLIC and the Bank Board also permitted some acquirers to count all or a portion of the cash contributed by the FSLIC to the deal as a direct and commonly *permanent* credit to the acquired thrift's regulatory capital. This regulatory forbearance was called, not surprisingly, a "capital credit."

The FSLIC and the Bank Board thus used supervisory goodwill and capital credits, as Bank Board Chairman Pratt

[2] The Bank Board developed an entire menu of cash substitutes used to induce acquisitions of insolvent thrifts. The substitutes were even standardized to expedite the processing of these transactions, and to diminish staff time in negotiating these deals. The Bank Board issued a memorandum, denominated SP-37(a), to its Principal Supervisory Agents, providing a standard list of non-cash accounting forbearances. J.A. 180-207. Memorandum SP-37(a) made clear that "[t]he basic purpose in granting forbearances is to give realistic incentives to potential acquirers of problem institutions." J.A. 182. The suggested forbearances included separate language effectuating the use of supervisory goodwill and regulatory capital credits. *See* J.A. 194, 195.

testified in 1982, "as a means of conserving FSLIC's insurance fund." Pratt testimony at 1502.[3] And it worked. By offering regulatory capital forbearances, FSLIC and the Bank Board "stimulated many acquisitions that would otherwise not have taken place" absent much greater cash contributions by FSLIC. Pet. App. 7a. As a result, the average cost to FSLIC of facilitating the acquisition of an insolvent thrift was reduced to less than 20 percent of the estimated liquidation cost. Pratt testimony at 1501.

Congress was fully informed of the Bank Board's use of supervisory goodwill and capital credits in lieu of cash to facilitate acquisitions of insolvent thrifts. Indeed, the Bank Board's "consistent policy of forbearance toward capital deficient thrifts" and its "development and use of regulatory accounting principles . . . that served to artificially inflate the value of thrift capital," were undertaken "with Congressional consent." S. Rep. No. 19, 101st Cong., 1st Sess. 9 (1989).

2. a. After "year-long negotiations between Statesman and FHLBB and FSLIC," Pet. App. 109a, Statesman acquired four deeply insolvent thrifts in March 1988. In 1987 FSLIC had solicited 96 financial institutions and 41 private investors to bid on the four thrifts, but Statesman was the only party to submit a proposal. C.A. App. 69 (under seal).[4] Thus, had a deal with Statesman not been consummated, the government's only alternative would have been liquidation.

Statesman agreed to invest $21 million in the merged institutions, and the government agreed to make a $60 million capital infusion. Even after these capital infusions had been made, however, the merged institution acquired by Statesman

[3] In congressional testimony in 1990, former Chairman Pratt recalled that supervisory goodwill had been "an indispensable tool" in the Bank Board's efforts to consolidate "weaker institutions into stronger hands . . . while at the same time husbanding the financial resources which were then available to it." Pet. App. 7a, quoting Savings and Loan Policies in the Late 1970s and 1980s: Hearings Before The House Comm. on Banking, Finance, and Urban Affairs, 101st Cong., 2d Sess. 176, 227 (1990).

[4] "C.A. App." refers to the appendix filed jointly by the parties in the Court of Appeals.

was still insolvent, with a *negative* tangible net worth of almost $9 million. In other words, Statesman invested $21 million in a thrift that not only failed to satisfy, on a tangible capital basis, the government's minimum regulatory capital standards, but was deeply insolvent and thus subject to seizure by the thrift regulators on the very day that they delivered it to its new owners. Pet. App. 64a.

Statesman agreed to this seemingly foolish acquisition because it bargained for and received from the government express contractual promises (1) that the supervisory goodwill created by the transaction – a figure ultimately calculated to be $25.8 million – could be reported by the thrift as regulatory capital and amortized over a period of 25 years, and (2) that $26 million of FSLIC's cash contribution could be recorded as a direct and permanent capital credit to the thrift's regulatory capital. Pet. App. 10a. In return for these regulatory capital forbearances, the FSLIC and the Bank Board received what they believed to be a "permanent" disposition of four of their serious problem thrifts at a cost to the insurance fund far lower than the cost of liquidation.

The value to the government of these regulatory capital forbearances was enormous and readily quantifiable. Indeed, shortly after the Statesman deal was closed, Bank Board Chairman Wall touted it to Congress as costing the government "$50 million less than the cost to the FSLIC of liquidating the four institutions." Oversight on the Condition of the Financial Services Industry: Hearings Before The Senate Comm. on Banking, Housing, and Urban Affairs, 100th Cong., 2d Sess. 356 (1988). J.A. 487. In other words, Statesman agreed to shoulder $50 million of the government's cost of resolving four of its failed thrifts. The value of the supervisory goodwill and capital credit to Statesman, on the other hand, derived not from any inherent worth, but solely from the government's promise to count them as regulatory capital, a promise that only the government could make.

Statesman took the government at its word, and fully performed its end of the bargain. Indeed, Statesman's new thrift far exceeded the thrift regulators' most optimistic projections. Under Statesman's management the thrift's tangible

net worth increased more than $6 million – from negative $9 million to just under negative $3 million. Yet, on July 5, 1990, the thrift regulators declared Statesman's thrift to be "in an unsafe and unsound condition to transact business," C.A. Supp. App. 1071, despite the plain fact that the thrift was by then far safer and sounder than it was a scant 20 months earlier, when the government turned it over to Statesman. The government seized the much-improved thrift, along with Statesman's $21 million.

The government changed its mind about the soundness of the thrift's financial condition because it changed its mind about allowing the thrift to report its bargained-for supervisory goodwill and capital credit as regulatory capital. Pursuant to FIRREA, the Bank Board's successor agency, the Office of Thrift Supervision ("OTS"), promulgated new minimum capital standards that largely eliminated the thrift's ability to report its goodwill and capital credit as regulatory capital – the central *quid pro quo* for Statesman's agreement to acquire the insolvent thrifts on the financial terms negotiated by the parties. If the government had honored its contractual obligations to Statesman, the thrift would have satisfied – with millions to spare – all three of the new minimum regulatory capital standards established by FIRREA. Pet. App. 113a-114a. Thus, as the Court of Federal Claims concluded, "but for the enactment of FIRREA, Statesman would be operating today." Pet. App. 114a.

b. In late 1983 FSLIC and the Bank Board began soliciting bids for the acquisition of Windom Federal Savings & Loan Association, an insolvent thrift institution whose failure was imminent and whose liquidation would cost FSLIC an estimated $12 million. Pet. App. 184a. Winstar, which was organized by private investors for the sole purpose of acquiring the thrift, submitted the winning bid, which saved FSLIC more than half the estimated cost of liquidating the thrift. Pet. App. 185a. Pursuant to the parties' acquisition agreement, Winstar invested approximately $2.8 million in the thrift, while the FSLIC contributed approximately $5.6 million. Pet. App. 194a. Even with these capital contributions, the acquired thrifts tangible net worth was approximately *negative* $6.7

million. Accordingly, the "linchpin of the parties' agreement," as the trial court noted, was the government's express promise that the goodwill resulting from the transaction – slightly over $10.6 million – could be reported as regulatory capital: "[T]he promise of continued treatment of goodwill as a capital asset that could be amortized over 35 years was a negotiated and critical term of this particular transaction. It was critical because it was clear that without it no purchaser would have engaged in this transaction." Pet. App. 154a.

Winstar's thrift failed to satisfy FIRREA's new minimum capital standards. In May of 1990, OTS placed the thrift in receivership. Pet. App. 14a.

c. The record of these cases thus makes clear that using favorable regulatory capital forbearances to induce Winstar and Statesman to acquire failed thrifts was *the government's idea*. Far from the disinterested regulators portrayed in the government's brief, FSLIC's commercial and financial interests as a deposit insurer were vitally at stake in these transactions, and it needed to sell the failed thrifts to Statesman and Winstar far more than Statesman and Winstar needed to buy them. The FSLIC and the Bank Board offered supervisory goodwill and capital credits as substitutes for the cash that they did not have, and they aggressively encouraged Statesman and Winstar to accept these regulatory capital forbearances as *consideration*, the *quid pro quo* for assuming liabilities that far exceeded the assets acquired. And the Statesman and Winstar transactions saved the insurance fund, by FSLIC's own reckoning, almost $60 million over the cost of liquidating the insolvent institutions. Pet. App. 11a-12a. In light of these facts, it is hardly surprising that Circuit Judge Newman, in dissenting from the panel majority's decision below, was moved to remark that the government's disavowal of its contractual obligations in this case "comes with poor grace, not only in view of the government's encouragement of these arrangements when they were made, but also because performance was accepted by the government for several years." Pet. App. 95a.

3. Statesman and Winstar filed suit against the United States in the Court of Federal Claims, seeking monetary relief

on contractual and constitutional theories. The trial court granted, in separate opinions, both Statesman's and Winstar's motions for summary judgment as to liability. Pet. App. 106a-152a (*Statesman*); Pet. App. 153a-182a (*Winstar*). The Court held that the government had entered into an express contract with Statesman, and an implied-in-fact contract with Winstar, regarding the regulatory capital treatment of supervisory goodwill (and in *Statesman*, the capital credit), and that the government had breached its contractual obligations. In light of its finding of liability on respondents' contract claims, the court did not reach respondents' claims under the Takings Clause and the Due Process Clause of the Fifth Amendment. The court rejected the government's arguments that the "sovereign acts" doctrine and the "unmistakability" doctrine shielded the government from monetary liability. The court consolidated the *Statesman* and *Winstar* cases with the similar *Glendale* case and certified its decisions for interlocutory appeal to the Federal Circuit.

4. A divided panel of the Federal Circuit, over Judge Newman's dissent, reversed the trial court's liability rulings in favor of Statesman and Winstar. Pet. App. 53a-88a; 89a-103a (Newman, J., dissenting). The panel decision was vacated, however, when the full court granted respondents' petitions for rehearing *en banc*. Pet. App. 105a. The *en banc* Federal Circuit affirmed the trial court's contract liability rulings by a 9 to 2 vote. Pet. App. 1a-52a. The court of appeals painstakingly reviewed *de novo* the contract documents governing the transactions and concluded, as the trial court had, that the regulatory capital treatment of supervisory goodwill (and of Statesman's capital credit) was a specifically bargained for and agreed upon term of the contracts between the parties.

With respect to the Statesman transaction, the court of appeals first noted that the government had conceded that the "Assistance Agreement" executed by the parties contained an express term allowing Statesman to report its $26 million capital credit as regulatory capital. The court of appeals found the government's promise concerning supervisory goodwill specifically described in the resolution issued by the Bank

Board in connection with the transaction. The Bank Board's resolution, which also reiterated the government's promise concerning Statesman's $26 million capital credit, expressly provided that in "report[ing] to the Bank Board and the FSLIC, . . . [t]he value of any unidentifiable intangible assets [*i.e.*, goodwill] resulting from accounting for the Acquisition . . . in accordance with the purchase method of accounting may be amortized by [Statesman] over a period not in excess of twenty-five (25) years by the straight line method." Pet. App. 25a-26a. The Federal Circuit rejected the government's argument that the Bank Board's resolution did not constitute a contract document, noting that the Assistance Agreement contained an integration clause that expressly incorporated contemporaneous resolutions of the Bank Board. Pet. App. 25a. Accordingly, the Federal Circuit concluded that the government was contractually bound to permit Statesman to report its supervisory goodwill and capital credit as regulatory capital on the specified terms.

With respect to the Winstar transaction, the court of appeals found that the government had expressly promised to treat Winstar's supervisory goodwill as regulatory capital, and thus it did not need to reach the question whether such a promise could be implied-in-fact. Although the Assistance Agreement did not contain a specific provision relating to supervisory goodwill, it did contain an integration clause specifically incorporating into the parties' contract any "resolutions or letters issued contemporaneously" by the Bank Board. A "forbearance" letter issued by the Bank Board in connection with the transaction specifically "confirmed the understanding" of the parties that "[f]or purposes of reporting to the Board," Winstar would be entitled to amortize its goodwill "over a period not to exceed 35 years by the straight-line method." Pet. App. 28a.

Having found express contractual commitments by the government concerning the regulatory capital treatment of respondents' supervisory goodwill and capital credit, the Federal Circuit readily and correctly concluded that the government's repudiation of those commitments constituted a breach of its contractual obligations. The court of appeals also

rejected the government's claim that its contractual commitments concerning regulatory capital were negated under the so-called "unlawful action" clause of the parties' agreement when FIRREA was enacted.

The Federal Circuit turned next to the government's sweeping claim that respondents' contracts failed to satisfy the requirements of the "unmistakability doctrine." Relying primarily on this Court's decision in *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986) ("*POSSE*"), the government argued that because respondents' contracts did not contain an express provision guaranteeing that the government would continue to honor the regulatory capital forbearances notwithstanding a legislative change such as FIRREA, the contracts should not be construed as unmistakably waiving Congress' sovereign power to legislate. Quoting liberally from the trial court's analysis of the unmistakability doctrine, the Federal Circuit reasoned that the government's argument was based upon the false premise that respondents sought to bind "Congress not to change its regulations." Pet. App. 37a. Respondents, however, were not seeking to "enjoin[ ] the thrift regulators from applying the FIRREA requirements to the thrifts." Pet. App. 37a. Rather, they sought only monetary relief for the harm that they suffered when FIRREA's requirements *were applied* to them. Thus, the court of appeals concluded that upholding the government's contract liability to respondents would not threaten Congress' sovereign power to legislate. Pet. App. 38a.[5]

---

[5] With respect to the distinct government promise regarding the treatment of Statesman's $26 million capital credit, the Federal Circuit also noted that "FIRREA did not specifically cover capital credits or otherwise exclude FSLIC cash contributions from capital for purposes of determining compliance with any of the minimum capital requirements," Pet. App. 13a, but did not need to address the significance of this fact in light of its rejection *in toto* of the government's claim to immunity. The distinctive nature of the government's commitments regarding capital credits, as well as the fact that FIRREA did not abrogate those commitments, is discussed at length in the brief filed in this case by *amici* Coast Federal Bank, Union Federal Savings Bank of Indianapolis, Union Holding Company, Inc., Meadows Resources, Inc., and Republic Holding Company.

With specific reference to this Court's decision in POSSE, the Federal Circuit agreed with the trial court that "the unmistakability doctrine . . . controls how contractual rights with the government are *created*, *i.e.*, whether the government has agreed in unmistakable terms to be contractually bound." Pet. App. 35a-36a (emphasis in original). Because Winstar's and Statesman's contracts granted them, "in the clearest possible terms, the right to certain types of regulatory capital treatment," the requirements of the unmistakability doctrine were satisfied. Pet. App. 36a.

Finally, the Federal Circuit rejected the government's defense under the "sovereign acts doctrine," which excuses the government from contract liability when its performance is precluded by "a public and general sovereign act." Pet. App. 39a. FIRREA's provisions concerning supervisory goodwill did not qualify as "public and general" sovereign acts because they specifically targeted respondents' agreements and similar contracts. FIRREA's provisions restricting the regulatory capital treatment of supervisory goodwill, while no doubt enacted for the public good, "specifically abrogate[d] agreements the government had made at an earlier time when it had suggested and approved the use of such 'gimmicks' to avoid bailing out failing thrifts." Pet. App. 43a. Because the government had "plainly sought to render its own performance impossible," the sovereign acts doctrine did not insulate it from damages liability. Pet. App. 45a.

Judge Nies and Judge Lourie filed separate dissents. Judge Nies continued to adhere to the views expressed in her majority opinion for the panel. (The other member of the panel majority, Judge Rich, changed his mind on reconsideration and joined the *en banc* majority.) Judge Nies believed that the majority had erred in failing to distinguish between the "government" and Congress in concluding that the enactment of FIRREA had breached respondents' contracts. Pet. App. 47a. Judge Lourie concluded that the sovereign acts doctrine precluded respondents' recovery for breach of contract because FIRREA was "broadly directed to the good of the general public, to the country's financial system, rather than to a specific contract that it disapproved." Pet. App. 51a.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents' claim is simple and straightforward, a point that tends to be obscured by the heft of this brief and of the briefs filed by our many *amici*. Winstar and Statesman were induced by the government's thrift regulators to acquire at great expense deeply insolvent thrifts on the basis of the government's contractual commitment to accord the acquired institutions certain specifically negotiated and clearly expressed regulatory capital forbearances. Respondents fully performed their contractual obligations, but the government did not, causing respondents substantial damage. If it is still true, as it always has been, that "in the performance of its voluntary engagements with its citizens [the government] should conform to the same standard of honorable conduct as it exacts of them," *Heil v. United States*, 273 F. 729, 731 (S.D.N.Y. 1921) (Hand, J.), then the courts below did not err in holding the government liable in damages for its breach.

The government's defense, in contrast, is sophisticated and complex, and its many facets take many pages to rebut. It boils down, however, to a claim that our law attaches *no consequence whatever* to the government's deliberate repudiation of specific contractual commitments that formed the principal *quid pro quo* for Statesman's and Winstar's costly acquisitions. Indeed, the government says that it is even entitled under the law to keep the multi-million dollar investments that it solicited from Statesman and Winstar and then seized along with the thrifts. No federal case supports the government's claim.

The government's argument opens with the contention that the specifically negotiated, unambiguous, and express contractual promises concerning respondents' regulatory capital forbearances were not sufficiently "unmistakable" to create binding obligations on the government. They were not unmistakable, the government says, because the parties' contracts did not contain language expressly "contracting away [Congress's] right to exercise future sovereign regulatory authority"; that is, the contracts did not include language "either commit[ing] Congress not to enact new legislation

requiring a different treatment of respondents' capital or grant[ing] respondents a prospective immunity from any such legislative change." Pet. Br. 19, 36.[6] The government quickly adds, however, that even if respondents' contracts did contain express provisions satisfying the government's version of the "unmistakability doctrine," respondents still lose. Any such express contractual promise would be *ultra vires*, and thus "invalid and unenforceable," *id.* 37, because the Bank Board did not have "an express delegation of authority from Congress" to enter into "an agreement that binds future Congresses not to change regulatory schemes or that immunizes private parties from the effects of such changes." *Id.* 36. In the next breath, however, the government notes that respondents' case would not really be improved even if we could produce such an extraordinary statutory delegation of authority to the thrift regulators. Any such delegation would itself be *ultra vires*, for under the "reserved powers doctrine" the government's "sovereign regulatory authority" cannot be " 'bargained away, and is inalienable even by express grant' " of the legislature itself. *Id.* 38, quoting *Atlantic Coast Line R.R. v. City of Goldsboro*, 232 U.S. 548, 558 (1914).

Thus, the government's arguments add up to this: under the unmistakability doctrine a government agency's contractual commitment concerning its regulatory authority must be expressed in unmistakable terms, although such a promise, no matter how unmistakable, will nonetheless be invalid and unenforceable under the reserved powers doctrine. Obviously, the government is confused about the legal principles governing its contractual undertakings.

The government's confusion stems from its insistence that respondents' claims for contract damages are to be

---

[6] In its briefing to the Federal Circuit, the government offered even more specific insight into its version of the unmistakability doctrine, asserting that it could not be held liable to respondents in the absence of "an unambiguous contract provision stating that [the thrift agency] was guaranteeing a specified form of regulatory treatment for a single thrift, and that the contract would override any attempt by Congress to legislate differently for the thrift industry." Replacement Reply Brief of Defendant-Appellant United States at 9.

analyzed as if respondents were seeking an order invalidating FIRREA's restrictions on supervisory goodwill and enjoining the government to specifically perform its contractual obligations according to their terms. Every case cited by the government in support of its unmistakability and reserved powers contentions involved either a Contract Clause or a Due Process Clause challenge to the constitutional *validity* of a statute that impaired the government's performance of its pre-existing contractual obligations. A decision upholding the constitutional challenge in these cases would have voided the legislation impairing the government's contractual obligation, thus requiring the government to abide by its agreement according to its terms. In other words, successful assertion of a Contract Clause or Due Process Clause challenge to a law impairing a prior government contractual obligation is tantamount to an award of specific performance;[7] the contract obligation effectively overrides subsequent contrary legislation, thus "binding [the government] to a future course of conduct" at least with respect to the contracting parties. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 23 (1977).

It was in this context, as the government acknowledges (Pet. Br. 38), that the "reserved powers doctrine" was developed to ensure that "the obligation of contracts does not *prevent* the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public. . . . " *Manigault v. Springs*, 199 U.S. 473, 480 (1905) (emphasis added). This Court described the reserved powers doctrine succinctly in *United States Trust*: "[T]he Contract Clause does not require a State *to adhere* to a contract that surrenders a central attribute of its sovereignty." 431 U.S. at 23 (emphasis added). In other

---

[7] Michael L. Zigler, Note, *Takings Law and the Contract Clause: A Takings Law Approach to Legislative Modifications of Public Contracts*, 36 Stan. L. Rev. 1447, 1462 (1984) ("[T]he contract clause effectively grants public contract holders a constitutional right to specific performance. . . . [A]nalysis under the contract clause is limited to declaring the statute unconstitutional. The provision does not authorize the courts to award damages in lieu of requiring the state to adhere to the original terms of the contract.")

words, a contractual obligation does not constitutionally "prevent" a State from enacting contrary legislation under its police powers, nor does it constitutionally require a State "to adhere to" its contractual obligation in the face of such legislation. In this context, the Contract Clause leaves a contracting State in the same shoes as any other contracting party – it may elect to breach its contractual obligation and pay damages.[8]

The courts below well understood this point. As the *en banc* Federal Circuit put it: "[C]ongress was always free to deem supervisory goodwill a bad idea and legislate it out of existence. Where that legislation breached the government's prior contractual obligations regarding the treatment of supervisory goodwill, however, the government remains liable in money damages for the breach." Pet. App. 38a.

The alleged rationale for the government's novel version of the "unmistakability doctrine" is derived directly from the reserved powers doctrine. Because government promises of specific regulatory treatment in the future may frustrate the ability of government to take contrary regulatory action deemed in the public interest, the requirement that such promises be expressed in unmistakable terms "helps to ensure that public officials who enter into contracts – and others who

---

[8] "When a man makes a contract, he incurs, by force of the law, a liability to damages, unless a certain promised event comes to pass. . . . The [common] law seems to have regarded it as technically in the election of the promisor to perform or to pay damages." *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 543 (1903). Restatement (Second) of Contracts ch. 16, intro. note (1981) ("The traditional goal of the law of contract remedies has not been compulsion of the promisor to perform his promise but compensation of the promisee for the loss resulting from breach. . . . In general, therefore, a party may find it advantageous to refuse to perform a contract if he will still have a net gain after he has fully compensated the injured party for the resulting loss."); E. Allan Farnsworth, *Contracts* 840 (2d ed. 1990) ("[A]long with the celebrated freedom to make contracts goes a considerable freedom to break them as well.").

review them – are fully aware of the serious step they are taking." Pet. Br. 11.

In this case, the public policy considerations underlying the reserved powers doctrine and the government's unmistakability doctrine are wholly inapplicable. Respondents are not challenging the constitutional validity of FIRREA's goodwill provisions, nor are they seeking to require the government "to adhere to [its] contract" regarding supervisory goodwill and capital credits. It is too late for that; the government has applied FIRREA's goodwill provisions to respondents' thrifts and, consequently, has regulated them out of existence. In other words, the government elected to breach, and respondents seek only to be compensated for their injury. The issue in this case, therefore, is not whether the government's regulatory capital promises were "unmistakable" enough to constitutionally immunize respondents from application of FIRREA's goodwill provisions, but rather whether the government is constitutionally immune from damages liability for its breach of express regulatory capital promises for which it sought and received valuable consideration. The government can cite no constitutional provision, and no case, supporting its claim of immunity from contract damages for its repudiation of its agreements with Statesman and Winstar.

In the pages that follow, we demonstrate that the federal thrift regulators, knowingly and with full authority, entered into contracts with Statesman and Winstar that anticipated the possibility of future regulatory changes and expressly agreed, in as unmistakable a fashion as possible, that the regulatory accounting treatment promised in these agreements would govern over any future regulatory change.

We further demonstrate that no attribute of the government as sovereign immunizes the government from liability in damages for its abrogation of its contractual obligations to Statesman and Winstar. The "sovereign acts" doctrine ensures that the federal government, as a contracting party, is accorded the *same* treatment under the law as is accorded to private contracting parties; if a private party would have been liable under the contract, then so also is the government. Accordingly, the Federal Circuit was correct in concluding

that the doctrine "does not relieve the government from liability where it has specifically undertaken to perform the very act from which it later seeks to be excused." *Hills Materials Co. v. Rice*, 92 F.2d 514, 516 n.2 (Fed. Cir. 1992).

ARGUMENT

I. THE GOVERNMENT UNMISTAKABLY AGREED TO ACCORD REGULATORY CAPITAL TREATMENT TO RESPONDENTS' SUPERVISORY GOODWILL AND CAPITAL CREDIT FOR SPECIFIED TIME PERIODS.

1. "All contracts are to be construed to accomplish the intention of the parties." *The Binghamton Bridge*, 70 U.S. (3 Wall.) 51, 74 (1865).[9] The intent of contracting parties is often no less obvious from the economic realities surrounding a transaction than it is from the contract documents themselves. Courts are thus naturally reluctant to interpret a contract in a manner that renders the bargain illusory or economically irrational for one of the parties.[10]

The contract interpretation advanced by the government in this case is no less at war with common sense than it is

---

[9] *See id.* at 76 ("[T]he main canon of interpretation of a contract, is to ascertain what the parties themselves meant and understood."). *Bradley v. Washington, Alexandria, and Georgetown Steam Packet Co.*, 38 U.S. (13 Pet.) 89, 96-97 (1839) ("It is a principle recognized and acted upon by all courts of justice, as a cardinal rule in the construction of all contracts, that the intention of the parties is to be inquired into; and if not forbidden by law, is to be effectuated."). *See also* Restatement (Second) of Contracts § 201 cmt. c (1981) ("[T]he primary search is for a common meaning of the parties. . . . The objective of interpretation in the general law of contracts is to carry out the understanding of the parties. . . . ").

[10] *See, e.g., Russell v. Sebastian*, 233 U.S. 195, 208 (1914) (rejecting State's argument that plaintiff gas company had made extensive investment in plants and reservoirs "without any assurance that the laying of the distributing system could be completed, or that it could even be extended far enough to afford any chance of profit"); *Appleby v. Delaney*, 271 U.S. 403, 413 (1926) (city's contract interpretation rejected because "[i]t is not reasonable to suppose that the [plaintiffs] would pay $12,000 . . . and leave to the city authorities the absolute right completely to nullify the chief consideration").

with the written agreements executed by the parties. According to the government, the parties' written agreements in this case "contain no undertaking by FSLIC that its parent body – the Bank Board – or Congress would not change [thrift capital] requirements or the treatment of goodwill under them," and that the courts below therefore simply "hypothesiz[ed] an intent by the thrift regulators" to agree "that goodwill would continue to be treated as capital in the future." Pet. Br. 15. The government thus represents to this Court that when it shook hands with Statesman and Winstar on these transactions in 1988 and 1984, all parties fully understood and intended that the Bank Board was entitled under their contracts to exclude supervisory goodwill from regulatory capital *at that very moment*. The parties intended, in other words, that the government was "agreeing to abide by its promises only so long as it unilaterally decided to keep those promises." Pet. App. 128a. Given that supervisory goodwill was the only thing standing between respondents' thrifts and "immediate liquidation," Pet. App. 64a, the common sense of the matter, as the trial court below put it, is that "no purchaser would have engaged in [these] transaction[s]" without "the promise of continued treatment of goodwill as a capital asset that could be amortized over [the specified number of] years." Pet. App. 190a.[11]

---

[11] The government resists this conclusion on two grounds. First, the government notes that Statesman and Winstar "obtained the benefits of the Bank Board policy permitting them to count goodwill as capital" for 20 months and five years, respectively. Pet. Br. 42-43. But the fact that the government honored its contractual commitments for a brief period of time does not ameliorate, let alone eliminate, the harm that its repudiation caused to respondents. More fundamentally, the government's brief periods of performance under its contracts does not alter the fact that its alleged contract obligation – to perform at its "unrestricted pleasure" – was simply no obligation at all. Pet. App. 128a.

The government also points out that Statesman and Winstar "received substantial infusions of federal cash" as consideration in the transactions. Pet. Br. 43. The government forgets that it, not Statesman and Winstar, was the insurer of the deposits of the insolvent thrifts. The government's cash contributions were necessary to cover, though only partially, the losses already suffered by the federally insured insolvent thrifts. Statesman's and Winstar's combined capital

The truth is that precisely because of the historically volatile nature of the government's regulation of thrift capital standards (they "changed three times in 1982 alone," Pet. App. 57a), Statesman and Winstar painstakingly negotiated over many months regulatory capital forbearances that would make their acquisitions viable. And they insisted that the parties' regulatory capital agreements be incorporated, repeatedly, in the contract documents governing the transactions – a process that would have been meaningless if, as the government now absurdly contends, these provisions were merely superfluous acknowledgments of the government's regulatory policy at the time.

The government's assertion that it made no promises and assumed no risks in connection with its transactions is expressly belied by the "Assistance Agreement" that it executed. This document provides: "It is the purpose of this Agreement to provide a means by which . . . the [FSLIC] may receive the benefits and *assume the risks contracted for*, and expense to the [FSLIC] may be reduced." J.A. 409 (*Statesman*) (emphasis added). As we demonstrate below, the government clearly and expressly assumed in these transactions the risk that future regulatory changes would prevent fulfillment of its regulatory capital promises.[12]

---

investment of almost $24 million was a direct contribution to the *government's* losses as deposit insurer. And if these transactions had not been consummated, the government estimates that its losses on the insolvent thrifts would have run another $60 million. Thus, the reality of these transactions is that Winstar and Statesman contributed almost $24 million to the government for the privilege of assuming almost $60 million of additional government liabilities.

[12] The government, citing three decisions, argues that courts have held that documents similar to those at issue here were not sufficient to establish the existence of enforceable contracts regarding the regulatory accounting treatment of supervisory goodwill and regulatory capital credits. Pet. Br. 22 n.12. Leaving aside the fact (as explained *infra* n.21) that the decisions cited by the government are readily distinguishable, the government ignores numerous other cases in which courts, examining documents either very similar to, or even less explicit than, the documents evidencing the transactions at issue here, have concluded that the government did enter into such contracts for particular accounting treatment. *See, e.g., RTC v. FSLIC*, 25 F.3d 1493 (10th Cir. 1994); *Far West Fed. Bank v. Director,*

2. a. *Statesman.*

In 1988 Statesman and the government executed a lengthy "Assistance Agreement," as well as a separate "Regulatory Capital Maintenance Agreement." The Assistance Agreement contains an integration clause providing that "[t]his Agreement, together with any resolutions adopted by the Bank Board and documents delivered at closing which contain written interpretations or understandings of the parties, constitutes the entire agreement between the parties . . . , excepting only . . . any resolutions or letters . . . issued by the Bank Board . . . in connection with the approval of the Acquisition. . . . " J.A. 407-08. In light of this language, the courts below uniformly found (Pet. App. 25a, 62a, 121a), that two other documents – a "Resolution" and a "Forbearance Letter" executed by the Bank Board in connection with the approval of the acquisition – set out contract terms governing the transaction equal in legal force to those in the Assistance Agreement.[13]

The government concedes that the Assistance Agreement expressly committed the government to count $26 million of FSLIC's cash contribution as regulatory capital. Pet. Br. 34. Specifically, the Assistance Agreement provides:

> For the purposes of reports to the Bank Board . . . , $26 million of the contribution [made by FSLIC] shall be credited to [Statesman's] regulatory capital account and shall constitute regulatory capital (as defined in § 561.13 of the Insurance Regulations).

OTS, 787 F. Supp. 952 (D.Or. 1992); *Carteret Sav. Bank v. OTS*, 762 F. Supp. 1159 (D.N.J. 1991), *vacated on other grounds*, 963 F.2d 567 (3d Cir. 1992); *Hansen Sav. Bank v. OTS*, 758 F. Supp. 240 (D.N.J. 1991); *Security Fed. Sav. Bank v. Director, OTS*, 747 F. Supp. 656 (N.D. Fla. 1990); *Security Sav. & Loan Ass'n v. Director, OTS*, 761 F. Supp. 1277 (S.D. Miss. 1991), *aff'd in part, rev'd in part on other grounds*, 960 F.2d 1318 (5th Cir. 1992); *Sterling Sav. Ass'n v. Ryan*, 751 F. Supp. 871 (E.D. Wash. 1990), *rev'd on other grounds*, 959 F.2d 241 (9th Cir. 1992).

[13] The Assistance Agreement also contained an "Accounting Principles" section, which expressly provided that the accounting treatment of the transaction would be governed by the "resolution or action in the Bank Board approving or relating to the Acquisition. . . . " J.A. 402.

J.A. 362a. The government argues, however, that this provision obligated it to accord regulatory capital treatment to Statesman's $26 million capital credit only until it decided not to. Seizing upon the parenthetical statement providing that the capital credit shall constitute regulatory capital "(as defined in § 561.13 of the Insurance Regulations)," the government argues that its regulatory capital promise "depended entirely upon existing regulations and that the same treatment would not necessarily be accorded if changes were made in the governing regulations or statute." Pet. Br. 34, 35.

The government's interpretation of this provision, which renders Statesman's bargain entirely illusory, does not represent the intentions of the contracting parties. First, by incorporating by reference the definition of regulatory capital contained in the FSLIC's regulation, the parties' agreement incorporated the content of the regulation as it existed at the time of the contract. *See Craft Machine Works, Inc. v. United States*, 926 F.2d 1110, 1115 (Fed. Cir. 1991); *Hughes Communications Galaxy, Inc. v. United States*, 998 F.2d 953, 957-58 (Fed. Cir. 1993); *Hills Material Co. v. Rice*, 982 F.2d 514 (Fed. Cir. 1992). *See also Wood v. Lovett*, 313 U.S. 362, 369-70 (1941); *Van Hoffman v. Quincy*, 71 U.S. (4 Wall.) 535, 550 (1867). Moreover, the government's suggested interpretation is directly contradicted by other express provisions in the contract.

As previously noted, Statesman fully understood that regulatory capital standards could be changed by the government. Accordingly, it insisted that the "Accounting Principles" provision of the Assistance Agreement specifically provide that the government's contractual commitment concerning the regulatory accounting treatment of the transaction would govern over any conflicting present *or future* "regulations of the [FHLBB] or [FSLIC]." Because the Accounting Principles clause directly refutes the government's construction of the parties' agreement, and because the government's discussion of this key provision omits a critical sentence, we set the clause out at length, emphasizing the two key sentences:

> Section 17. *Accounting Principles*. Except as otherwise provided, any computations made for purposes of this Agreement shall be governed by GAAP, except that where such principles conflict with the terms of the Agreement, applicable regulations of the Bank Board or the CORPORATION, or any resolution or action of the Bank Board approving or relating to the Acquisition, the Mergers or to this Agreement, then this Agreement, such regulations, or such resolution or action shall govern. In the case of any ambiguity in the interpretation or construction of any provision of this Agreement, such ambiguity shall be resolved in a manner consistent with such regulations and the Bank Board's resolution or action relating to the Acquisition, the Mergers or of this Agreement. *If there is a conflict between such regulations and the Bank Board's resolution or action relating to the Acquisition, the Mergers or to this Agreement, the Bank Board's resolution or action shall govern. For purposes of this section, the accounting principles and governing regulations shall be those in effect on the Effective Date, as subsequently changed, amended, clarified or interpreted by the Bank Board . . . .*

J.A. 402-03. (emphasis added). Thus, the emphasized sentences of the Accounting Principles clause clearly provide that the Bank Board's Resolution and Forbearance Letter govern over any conflicting capital regulations, including "subsequently changed" or "amended" regulations.

The government's answer to the obvious import of the two emphasized sentences of the Accounting Principles clause is to hide the first one from this Court. The government's discussion of this clause (in connection with Winstar's virtually identical Accounting Principles clause), omits any reference to the first emphasized sentence, and quotes the second emphasized sentence standing alone. *See* Pet. Br. 31.

The government then invites this Court to interpret the second emphasized sentence as though the sentence preceding it did not exist, arguing that it shows "that the parties recognized that Bank Board policies could change, and that whatever new policies were adopted would, from then on, govern future accounting by" Statesman. *Id.* When the two sentences, however, are read together, as intended by the parties, it is clear that the clause means precisely the opposite of the government's suggested interpretation. Indeed, a candid reading of the Accounting Principles clause can yield no conclusion other than that reached by Circuit Judge Newman in dissenting from the panel majority's opinion below: "[T]he 'Accounting Principles' clauses in the Winstar and the Statesman agreements reflect the parties' recognition that the accounting principles might in the future be 'subject to clarification, interpretation or amendment', and provide that '[i]f there is a conflict between such regulations and the Bank Board's resolution or action . . . , the resolution or action shall govern.' " Pet. App. 101a.

The Bank Board Resolution referred to in the Accounting Principles clause set forth the parties' agreement concerning the regulatory capital treatment of both the $26 million capital credit and supervisory goodwill. The key provision of the Resolution warrants quotation in full:

> [T]he Acquisition and the Mergers shall be accounted for, and [Statesman] shall report to the Bank Board and the FSLIC, in accordance with generally accepted accounting principles prevailing in the savings and loan industry, as excepted, modified, clarified, or interpreted by applicable regulations of the Bank Board and the FSLIC, *except to the extent of the following departures from generally accepted accounting principles*:
>
> (a) Twenty-one million dollars of the initial contribution by the [FSLIC] to [Statesman], and five million dollars of the principal amount of the Subordinated Debenture issued to the FSLIC, pursuant to § 6 of the Assistance Agreement, shall be credited to the regulatory capital account of [Statesman]; and
>
> (b) The value of any unidentifiable intangible assets [*i.e.*, goodwill] resulting from accounting for the Acquisition and the Mergers in accordance with the purchase method of accounting may be amortized by [Statesman] over a period not in excess of twenty-five (25) years by the straight line method.

J.A. 458-59 (emphasis added).

Similarly, the Forbearance Letter issued by the Bank Board in connection with the transaction reiterated the government's agreement to allow Statesman to count $26 million of FSLIC's cash contribution as "a credit to [Statesman's] regulatory capital." The letter specified that "for regulatory accounting purposes, [Statesman] may book such contribution as a direct addition to its regulatory capital." J.A. 476.

The government dismisses the Bank Board's Resolution and Forbearance Letter as obligating only Statesman; they contain "no promises" by the government concerning regulatory capital, but rather "merely state[s] the requirements for Statesman to capitalize goodwill under then-current regulatory capital policy." Pet. Br. 33. One need look no farther than the Forbearance Letter's name to refute the government's remarkable argument. It was the government, after all, that was *forbearing* from enforcing certain otherwise applicable requirements of its then-current regulatory capital policies in order "to give realistic incentives to potential acquire[r]s of problem institutions." J.A. 182; *see* note 2, *supra*. The letter opens with the statement that "the following forbearances are hereby *granted*," and closes with an express reservation of all of the Bank Board's statutory authority "[o]ther than actions to enforce the regulatory requirements *waived* in accordance with paragraphs 1-5 . . . . " J.A. 475-80 (emphases added). Likewise, the Bank Board Resolution contains a number of

provisions expressly waiving specified regulatory requirements.[14] Indeed, in the very provision of the Resolution governing the regulatory capital treatment of Statesman's capital credit and supervisory goodwill, the Bank Board expressly agrees to the specified "departures" from its otherwise applicable regulatory accounting requirements.

Finally, the parties' Regulatory Capital Maintenance Agreement ("RCMA") expressly confirms that the government's Resolution and Forbearance Letter obligated it to accord the specified regulatory accounting forbearances. Executed by Statesman and FSLIC "[i]n consideration of the mutual promises contained [t]herein," J.A. 418, the RCMA expressly required Statesman to maintain the regulatory capital of the acquired thrifts "at the level . . . required by § 563.13(b) of the Insurance Regulations . . . or any successor regulation, as now or thereafter in effect." But the RCMA also specifically provided that Statesman's "Required Regulatory Capital shall be calculated . . . [to] include . . . Regulatory Capital amounts *permitted by the FSLIC in the Assistance Agreement and in the forbearances issued in connection with the transactions*. . . . " J.A. 418-19 (emphasis added).

In light of the foregoing express contractual provisions, the Federal Circuit, quoting the trial court, concluded that "the government granted [Statesman], in the clearest possible terms, the right to certain types of regulatory capital treatment." Pet. App. 36a. Indeed, far from placing itself at the regulatory mercy of the government, as the government would have it, Statesman can justly be accused of overkill in its insistence that the government's regulatory capital promises – a key term of the transaction for both sides – be expressed in

[14] *See* J.A. 449 ("the Bank Board . . . hereby waives and deems inapplicable" certain regulations); *id.* 452 ("good cause exists for a waiver of the requirements of" certain regulations); *id.* ("the terms of this Resolution, and not the requirements set forth in [specified regulations] shall govern" the transaction); *id.* 455 ("the Bank Board . . . hereby deems inapplicable and waives" certain regulations); *id.* 473 ("the Bank Board hereby waives the laws of any state" that interfere in certain ways with the insurance activities of Statesman's affiliates).

the parties' written contracts.[15] The conclusion is thus inescapable that the parties' agreement placed "the risk of a change in the governing law" (Pet. Br. 35) squarely on the government, rather than Statesman.[16]

[15] The importance and content of the government's regulatory accounting forbearances is also reflected in the negotiating record of the transaction, as well as in the government's own internal analysis of the deal. For example, Statesman's acquisition proposal explicitly required that "[t]wenty one million dollars of the cash contribution to be made to [Statesman] pursuant to an assistance agreement to be entered into between the FSLIC and Statesman is to be a credit to [Statesman's] regulatory capital; therefore, for regulatory accounting purposes, [Statesman] will book such contribution as a direct addition to its net worth." J.A. 215-16. Similarly, the Business Plan submitted as part of Statesman's proposal expressly "assume[d] the acquisition will be accounted for using the purchase method of accounting, applied by the 'push down' method. . . . " J.A. 232. *See also* J.A. 240. Similar explicit statements regarding Statesman's intentions were made in the holding company application submitted to FSLIC. *See* J.A. 245-46. Similarly, the government's internal documents analyzing the transaction make clear that the promised regulatory accounting forbearances were critical to its consummation and success. *See, e.g.*, FHLBB Memorandum (J.A. 280) ("It is the FSLIC's intention that $21 million of the cash contribution to be made to [Statesman] pursuant to an assistance agreement to be entered into between the FSLIC and [Statesman] is to be a credit to [Statesman's] regulatory capital; therefore, for regulatory accounting purposes, [Statesman] may book such contribution as a direct addition to its regulatory capital."); FHLBB Memorandum: Viability and Revised Bid Costing (C.A. App. 58) (under seal) ("Statesman will mark-to-market all assets and liabilities . . . under use of purchase accounting."); *id.* (C.A. App. 61) (under seal) ("$21 million of the FSLIC cash assistance . . . is a direct contribution to net worth"); FHLBB Issues Memorandum (C. A. App. 70) (under seal) ("$21 million of FSLIC's assistance will count towards regulatory net worth.").

[16] The government claims, Pet. Br. 35, that its contractual commitments concerning regulatory capital were negated under the so-called "unlawful action" clause of the parties' agreement. The clause provides: "Nothing in this Agreement shall require any unlawful action or inaction by either of the parties hereto." Pet. App. 23a. The Federal Circuit, like the trial court (Pet. App. 125a-129a), correctly interpreted this clause as protecting against any inadvertent violation of law existing when the contract was entered, rather than supplying "an escape hatch that allows the federal government to avoid performance of its contractual obligations without penalty by passing a law prohibiting its own performance." Pet. App. 23a-24a. The same answer applies to the standard provision in the Assistance Agreement requiring Statesman to comply "with all applicable statutes, regulations, orders of and restrictions imposed by the United States or any state, municipality, or other

b. *Winstar*.

Many of Winstar's contract documents are remarkably similar to those at issue in Statesman, and so many of the points previously made in answer to the government's arguments with respect to Statesman are equally applicable here. The Winstar Assistance Agreement contains an Accounting Principles provision that is virtually identical to the corresponding provision in the Statesman agreement (quoted at length above). *See* J.A. 108-09. The Assistance Agreement also contains a similar integration clause, incorporating into the parties' agreement the Bank Board's contemporaneous Resolution and Forbearance Letter.[17] J.A. 112. The Bank Board's Forbearance Letter, in turn, "confirm[ed] the understanding" of the parties that "[f]or purposes of reporting to the Board, the value of any intangible assets [*i.e.*, goodwill] resulting from accounting for the merger in accordance with the purchase method may be amortized by [Winstar] over a period not to exceed 35 years by the straight-line method." J.A. 123. As in *Statesman*, the Bank Board's Forbearance Letter in the Winstar transaction plainly expresses commitments on behalf of the government – to "forbear" and "waive" enforcement of otherwise applicable regulatory capital requirements. *See* J.A. 124. And the Accounting Principles clause in Winstar's Assistance Agreement, as in *Statesman*, makes clear that "in the event of regulatory change, the negotiated forbearances and accounting procedures would govern." Pet. App. 102a (Newman, J., dissenting).

The government seizes upon the language stating that the Accounting Principles clause applies only to "computations made for the purposes of this Agreement," arguing that because the Assistance Agreement contained no provision relating to supervisory goodwill, "no computations regarding

---

political subdivision," which specifically referenced such things as "equal employment opportunities" and "environmental standards." J.A. 407.

[17] Every court that has considered similar integration language has confirmed that it expressly incorporates Bank Board forbearance letters and resolutions into the parties' contractual arrangement. *See* Pet. App. 121a-122a (listing cases). *See also RTC v. FSLIC*, 25 F.3d at 1499.

goodwill or capital requirements had to be or were 'made for the purposes of this Agreement.' " Pet. Br. 30-31. Here again, however, the government ignores the agreement's integration clause, which expressly incorporated into the Assistance Agreement the Bank Board's Forbearance Letter, which expressly permits Winstar to count its supervisory goodwill as amortizing regulatory capital for 35 years. Nor does the government explain what "computations made for the purposes of this Agreement" the clause could possibly be referring to if not regulatory capital computations.

Finally, the government notes (Pet. Br. 31-32) that the Bank Board Resolution required Winstar to file a "Net Worth Maintenance Stipulation" requiring Winstar to maintain its "net worth . . . at a level consistent with that required by . . . the Insurance Regulations, *as now or hereafter in effect*." J.A. 78 (emphasis added). The Resolution thus contemplated, according to the government, "that regulatory capitalization requirements might be changed, and Winstar pledged to comply with those changes." Pet. Br. 32.

To be sure, the Resolution required Winstar to pledge to maintain the thrift's net worth at the "*level*" – that is, the *amount* as a percentage of assets – required under then-existing or later regulations. The Resolution did not contemplate, however, that the *calculation* of regulatory capital, or more accurately, the status of supervisory goodwill as an asset included in that calculation, would change. Indeed, Winstar fulfilled its obligation to provide the required Net Worth Maintenance Stipulation, and it was included in the parties' Assistance Agreement. Specifically, Winstar pledged to maintain its "Net Worth at an amount not less than the minimum amount prescribed in § 563.13 of the Insurance Regulations." J.A. 96. The Assistance Agreement then defines the term "net worth" as follows: "Regulatory Net Worth as defined in § 561.13 of the Insurance Regulations *and as computed in accordance with the accounting principles required by this Agreement*." J.A. 94 (emphasis added).

Winstar's contract documents thus plainly reflect the parties' agreement that Winstar could count supervisory

goodwill as regulatory capital for 35 years and that the government assumed the risk of future regulatory change.[18]

c. In sum, both the Federal Circuit and the Court of Federal Claims, which are especially entrusted with issues of government contract interpretation and enforcement, concluded from all the evidence that Statesman and Winstar specifically bargained for and received an express government promise to accord regulatory capital treatment to supervisory goodwill and capital credit for specified periods. This interpretation plainly accords with the intentions of the contracting parties, and the government's disingenuous attempt to suggest otherwise does it no credit.[19]

---

[18] The regulatory capital terms set out in the contract documents are consistently reflected in other documents related to this transaction. For example, the acquisition proposal documents prepared by Winstar clearly indicated that the resulting institution would "record the assets (other than FSLIC assistance) and liabilities acquired at the date of consummation of the combination at their fair value and the difference will be allocated to goodwill and amortized on the straight-line basis over a period not to exceed 35 years." C.A. App. 205. *See also* J.A. 40-42. Similarly, the government's internal documents analyzing the transaction recognized the regulatory capital forbearance as a key feature of the deal. *See, e.g.*, FHLBB Memorandum: Viability Analysis (J.A. 37) (listing as assumption that "[p]urchase accounting is applied to the assets of Windom. . . . Goodwill is amortized over 40 years."); FHLBB Memorandum (J.A. 46) (listing as assumption that "[g]oodwill is amortized over 35 years"); FHLBB S-Memorandum (J.A. 62) (noting "that the proposed acquisition requires the use of the purchase method of accounting, and that loan discounts and intangible assets will be amortized under regulatory accounting principles."); FHLBB Memorandum (J.A. 49) ("We concur . . . that the purchase method of accounting is appropriate for the acquisition of Windom. . . . Further, we have no objection to the accounting forbearance outlined for purposes of reports to the FHLBB.").

[19] Relying on the termination provisions in the *Winstar* and *Statesman* Assistance Agreements, the government also argues that whatever contractual commitments it made to respondents have by now terminated. Pet. Br. 32, 35 n. 25. The Court of Appeals quite correctly rejected this argument. Pet. App. 23a, 29a. The government's argument ignores the actual language of the Assistance Agreements, which provide that the Assistance Agreements would, "*[e]xcept as otherwise specifically provided . . . in th[e] Agreements*," terminate, in the case of *Statesman*, five years after the effective date of the agreement or, in the case of *Winstar*, two years after the effective date of the agreement. *See* J.A. 405 (emphasis added). *See also* J.A. 110. As the Court of Appeals held, such termination provisions did not "negate other obligations under the merger plan, including the specific time periods for amortization of goodwill." Pet. App. 23a. Finally, even if the government's strained reading of the termination provision is correct, the Statesman Assistance Agreement did not expire until 1993, four years *after* the passage of FIRREA.

3. a. The government relies upon the "unmistakability doctrine" for its claim that its contracts with Statesman and Winstar should be construed to create no obligation whatever on its part. According to the government, the unmistakability doctrine is a kind of "clear statement" rule of contract interpretation, designed to ensure that a government promise "contracting away the government's right to exercise future sovereign regulatory authority" is expressed in the "clearest possible terms." Pet. Br. 18-19. The rationale of the rule is that courts should be reluctant to interpret government contracts to prohibit the government from taking regulatory actions that may be deemed "necessary or advisable at a later time." Pet. Br. 18. To satisfy the unmistakability doctrine in this case, respondents would have to produce, according to the government, an express promise "either committ[ing] Congress not to enact new legislation requiring a different treatment of respondents' capital or grant[ing] respondents a prospective immunity from any such legislative change." Pet. Br. 36.

Throughout the course of this case, the government has stood silent in response to our repeated requests that it point to a single government contract – from any time in our Nation's history, involving any federal agency – that contains an express provision stating that the government's contract obligations will override any future statutory obligations imposed by Congress. We cannot find one either. One need know no more than this to know that the government's understanding of the unmistakability doctrine is wrong.

Indeed, if the government's version of the unmistakability doctrine is correct, then the many cases in which this Court has enforced contracts against the United States despite subsequent changes in the law must be wrong. For example, in *Perry v. United States*, 294 U.S. 330 (1935), this

Court held that a government bond promising the payment of principal and interest in gold was a binding contractual obligation that could not be abrogated by subsequent legislation. Similarly, in *Lynch v. United States*, 292 U.S. 571 (1934), the Court held that war risk insurance policies issued pursuant to statute were contracts that could not be abrogated by subsequent statutes without compensating the beneficiary. In neither *Perry* nor *Lynch* did the government contract at issue contain even a reference, unmistakable or otherwise, to Congress or its sovereign powers, let alone a provision "commit[ting] Congress not to enact new legislation." Pet. Br. 36. And, in both *Perry* and *Lynch* the Court made clear that the government is bound by its express contractual undertakings no less than an individual would be. *See Perry*, 294 U.S. at 352 ("When the United States, with constitutional authority, makes contracts, it . . . incurs responsibilities similar to those of individuals who are parties to such instruments."); *Lynch*, 292 U.S. at 579 ("When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."). *See also Sinking Fund Cases*, 99 U.S. (9 Otto) 700, 719 (1879) ("The United States are as much bound by their contracts as are individuals."); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 144 (1872) ("It is as much the duty of the government as individuals to fulfill its obligations.").

In truth, the government's notion of contract unmistakability misappropriates the nomenclature of a venerable and sensible rule of construction – that contract rights against the government cannot be presumed, but must be "expressed in terms too plain to be mistaken," *Jefferson Branch Bank v. Skelly*, 66 U.S. (1 Black) 436, 446 (1862) – and attaches it to an extraordinary claim of governmental immunity from liability for any contract breach occasioned by an act of Congress. The origins of the doctrine can be traced back to the early 1800s. In the leading case, *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514 (1830), a bank claimed that its charter from the State created a contract right precluding the State from taxing it. Chief Justice Marshall rejected the bank's claim that the charter impliedly prohibited taxation because

the taxing power could be exercised so as to destroy the charter. *Id.* at 561-62. Because the charter did not contain "a promise, either express or implied, not to tax the bank," *id.* at 560, the Court held that such a contractual promise "ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear." *Id.* at 561. Nowhere did the Court suggest that anything more "unmistakable" than an express promise not to tax would be required to bind the government.

Indeed, in *Jefferson Branch Bank v. Skelly*, *supra*, this Court held that a bank's charter created a contract right exempting the bank from taxation imposed by subsequent statute. The charter provision at issue provided that a certain percentage of the bank's profits were to go to the State "in lieu of all taxes."[20] Certainly this language – though unmistakable in the common sense of the term – does not satisfy the unmistakability rule advanced by the government. Yet this Court construed the charter provision to have contractually bound the state "in terms too plain to be mistaken." *Jefferson Branch Bank*, 66 U.S. (1 Black) at 446.

These cases are the direct ancestors of the three cases cited by the government in support of its version of the unmistakability doctrine – *POSSE*, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), and *United States v. Cherokee Nation*, 480 U.S. 700 (1987). *Merrion* involved leases granted by the Apache Tribe for the extraction of oil and gas deposits on reservation land. The Tribe later imposed a severance tax on oil and gas production covered by the leases, and the lessees sought to enjoin imposition of the tax on the ground that their leases exempted them from such taxes. The leases, however, were silent on the question of severance taxes. As the Court concluded:

> We could find a waiver of the Tribe's taxing power only if we *inferred it from silence* in the leases. To presume that a sovereign forever waives the right to

---

[20] *Piqua Branch v. Knoop*, 57 U.S. (16 How.) 369, 378 (1854). The Court's opinion in *Jefferson Branch Bank* does not set out the specific charter provision at issue, but it cites to the *Piqua Branch* decision, which does.

> exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in a commercial agreement turns the concept of sovereignty on its head . . . .

455 U.S. at 148 (emphasis added).

Quoting the above passage from *Merrion*, the Court in *POSSE* reiterated that a contractual waiver of the government's right to exercise sovereign powers cannot be inferred from contractual silence on the issue. *POSSE* involved a purported contract between the Department of Health and Human Services ("HHS") and the State of California governing the State's participation in the social security system. The agreement was expressly made subject to the provisions of the Social Security Act, which at the time the agreement was entered permitted states to withdraw from participation in the program. A subsequent amendment to the Act prohibited states from withdrawing from the system. This Court held that neither the Act nor the State's contract obliged the government to permit the State's withdrawal because Congress had expressly reserved in the statute the "right to alter, amend, or repeal" any of its provisions. 477 U.S. at 52. Thus, the Act itself obviously "created no contractual rights," and because the contract conformed to the Act, it too created no contractual right to withdraw. *Id.* *POSSE* thus stands for the common sense rule of construction that neither the government nor anyone else is contractually bound in the face of statements that expressly negate any intention to be bound. *POSSE* expressly reaffirmed, however, that "the Federal Government, as sovereign, has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights." *Id.*

Finally, in *Cherokee Nation*, the Tribe claimed that a treaty granting it title to a river bed also conveyed the federal government's navigational servitude, although the treaty was silent on the point. Citing *POSSE*, this Court rejected the claim, stating that such a waiver of "sovereign authority will not be implied but instead must be 'surrendered in unmistakable terms.' " *Id.* at 707, quoting *POSSE*, 477 U.S. at 52.

The consistent teaching of these cases is that an "unmistakable" promise is simply a clearly expressed promise. None of the cases even distantly suggests that in order to bind the government to a clearly expressed promise, it must be coupled with a further promise that Congress will not enact contrary legislation. Thus, while it is certainly true that the courts below expressly declined in this case to apply the government's version of the unmistakability doctrine, they faithfully applied this Court's version of the doctrine. *See also The Binghamton Bridge*, 70 U.S. (3 Wall.) at 75-77.[21]

---

[21] The government cites (Pet. Br. 22 n.12) three cases that, it says, properly applied the unmistakability doctrine to contracts similar to those at issue here. *See Charter Fed. Sav. Bank v. OTS*, 976 F.2d 203 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1643 (1993); *Transohio Sav. Bank v. Director, OTS*, 967 F.2d 598 (D.C. Cir. 1992); *Guaranty Fin. Serv., Inc. v. Ryan*, 928 F.2d 994 (11th Cir. 1991). In contrast to the Government's portrayal of those cases, however, both *Guaranty* and *Charter* represent straightforward applications of the principles discussed in *POSSE*.

In *Guaranty* the government expressly reserved its right to change applicable regulations and apply them to the thrift. 928 F.2d at 999. And the Fourth Circuit in *Charter* expressly distinguished that case from *Winstar* and *Statesman*, noting that *Charter* did not involve a written contract of any kind between the plaintiffs and the government. 976 F.2d at 211 n.12. That the *POSSE* doctrine precluded relief in cases in which there was no contract to begin with or in which the contract included an express reservation of authority to alter the terms of performance does not mean that it precludes relief here, where the parties' contracts clearly express the government's promise with respect to the regulatory capital forbearances at issue and which contain no similar language of reservation. Finally, the D.C. Circuit's application of the unmistakability doctrine in *Transohio* was limited to claims seeking injunctive relief, not compensation. Although the first *Transohio* decision had adopted the United States' erroneous view of contract interpretation in a case seeking injunctive relief, the second *Transohio* decision determined that rule may be inapplicable in a Tucker Act action for damages: "The *Transohio* opinion, including the statement that 'Transohio cannot prevail on its takings claim on the merits,' 967 F.2d at 614, was solely concerned with *Appellants' ability to obtain injunctive relief*, as is evident from the opinion's repeated explanations that Transohio 'did not receive from the banking regulators a right that *defeats Congress' power to change the law on goodwill accounting*.' *Id.* at 613; *see id.* at 601, 624. That analysis has no bearing one way or the other on the *merits of Appellants' claim for compensation* in the Federal Court of Claims." *Transcapital Fin. Corp. v. Director, OTS*, 44 F.3d 1023, 1025 (D.C. Cir. 1995) (emphases added).

b. In the introduction to our argument (*supra* at 13-17), we demonstrated that the rationale of the government's unmistakability doctrine, and of the reserved powers doctrine developed by this Court in the context of Contract Clause challenges, is wholly inapplicable to this case. Respondents do not seek an order invalidating FIRREA's goodwill provisions or otherwise requiring the government to abide by its contractual obligations. Nor do respondents seek the return of their thrifts; that egg cannot now be unscrambled. Respondents seek only monetary relief for their injuries, which "presents little threat to the government's sovereign powers." Pet. App. 37a.

The government argues, however, that "[t]he unmistakability doctrine protects against requiring the public to pay in damages for the privilege of changing government policy, just as it protects against injunctions precluding such alterations altogether." Pet. Br. 11. While requiring the government to respond in damages for a contract breach occasioned by a statutory or regulatory change would not *prevent* the exercise of sovereign authority, the government argues that the threat of a damages award would nonetheless "carr[y] the danger that needed future regulatory action will be deterred." Pet. Br. 21.

The law, however, attaches an obligation to pay damages not to "the privilege of changing government policy," but rather to the privilege of breaching a solemn contractual obligation. The purpose of the law of contracts is to "deter" breaches of contractual obligations secured by consideration. The government claims, however, that it is entitled, as sovereign, to make a contractual promise that in no way deters it from later breaching that promise. Mr. Hamilton answered this claim succinctly two centuries ago: "It is in theory impossible to reconcile the idea of a promise which obliges, with the power to make a law which can vary the effect of it." *Perry*, 294 U.S. at 351 n.2 (quoting Alexander Hamilton, "Report On Public Credit" (1795), in 3 *The Works of Alexander Hamilton* 518-19 (John C. Hamilton ed. 1850)).

Moreover, the assumption that allowing contract damages recovery in this case would financially harm the government ignores the extraordinary financial benefit that the government received from respondents in exchange for the contractual promises that the government has now broken. Thus, far from harming the government, damages relief is necessary to prevent a government windfall.[22] Similarly, upholding the government's claimed constitutional right to breach its contract obligations without liability would effectively expand the government's sovereign power beyond constitutional bounds. The thrift regulators could not have *forced* Statesman and Winstar to acquire the insolvent thrifts. Nor could they have forced respondents to donate almost $24 million to help the government defray the cost of recapitalizing its insolvent thrifts. Allowing the government now to repudiate, without liability, its contractual commitments to respondents would enable the government to accomplish through broken promises that which it could not have required through the compulsion of straightforward legislation.[23]

"The right to make binding obligations is a competence attaching to sovereignty." *Perry*, 294 U.S. at 353. The federal government, like any other contracting party, may elect to breach its contract obligations, but it must pay damages, like any other contracting party. *See* note 8, *supra*. The government's contrary claim misapprehends the nature of its own

---

[22] Allowing the government to breach its regulatory capital promises without consequence would effectively shift to respondents and others like them the dominant financial burden for the government's change in regulatory policy, solely because they took the government at its word. Far from being a necessary or legitimate element of sovereign power, the government's alleged entitlement to breach without damages liability runs counter to the basic purpose of the Takings Clause; namely, "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

[23] The government acknowledges (Pet. Br. 41 n.34) that it can claim no legitimate, let alone overriding, interest in "repudiat[ing] its own debts . . . simply in order to save money." *POSSE*, 477 U.S. at 55. The only governmental interest at stake, however, in this action for damages relief is money. It is thus clear that there is no serious "public policy" basis for denying respondents' claims.

accountability under our constitutional system. As the trial court below put it:

> The assertion that, in order to freely regulate, the government must have the power to disregard the rights and interests of its citizens is a novel proposition that finds no support . . . in our constitutional tradition. Sovereign power is always restricted, in one sense, by the rights of individuals. However, in our Nation that has never been seen as an improper restriction on regulatory power. Rather, it is the foundation upon which all law and regulation are built.

Pet. App. 168a.[24]

4. The reserved powers doctrine, as we have previously discussed (*supra* at 15-17), was developed by this Court to ensure that a State's contractual obligations did not limit, under the Contract Clause, a future exercise of the State's police powers in the area of health, safety, and public morals. *See, e.g., United States Trust*, 431 U.S. at 21-24. The Court has consistently recognized, however, that a State's "power to enter into effective financial contracts cannot be questioned," even though enforcing such contracts according to their terms necessarily entails restrictions on the State's taxing and spending powers. *Id.* at 24. *See also Energy Reserves Group v. Kansas Power & Light Co.*, 459 U.S. 400, 412-13 n.16 (1983) ("In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or

[24] *See also* Pet. App. 103a ("That the government may be empowered to legislate in this way, and that a desired public policy is served, does not mean that it can be done without liability to those with whom the government had made a different commitment. The government is not exonerated of responsibility with respect to specific commercial contracts to which it is a party, whether the breach is by executive or legislative action.") (Newman, J., dissenting); *id.* 192a-193a ("[W]hile Congress' power to regulate is not impaired, the government may be compelled to pay for the result of its actions, especially when in doing so the government actually is paying because it received a benefit. . . . The fact that the government was free to change its regulatory scheme is not inconsistent with the possibility that there exists a contract here under which the government may have obligations to the plaintiffs in this case.").

other markets."). The government concedes this point, recognizing that the government cannot "renege on purely financial contractual obligations." Pet. Br. 41; *see id.* at n.9 (noting that the price term and other financial elements of a government contract "do not implicate sovereign regulatory authority").

The contracts at issue here involved *commercial* transactions in which both parties were motivated by their own *economic* interests. The government's regulatory capital promises were made for financial reasons and they were breached for financial reasons. As the government itself emphasizes, goodwill was eliminated as regulatory capital under FIRREA because it "is not cash. . . . When the Federal Government liquidates a failed thrift, goodwill is simply no good. It is valueless. That means, quite simply, that the taxpayer picks up the tab for the shortfall." Pet. Br. 5, quoting 135 Cong. Rec. 11,795 (1989).

Thus, in 1989 the government rejected goodwill as regulatory capital for precisely the same reason that it embraced goodwill as regulatory capital in its transaction with Statesman – because it is not *cash*. As a substitute for cash, goodwill was used by the government as "an indispensable tool" in the government's effort to induce respondents' acquisitions on terms that "husband[ed FSLIC's] financial resources" from the enormous expense of liquidating or recapitalizing the insolvent thrifts. *See* note *3, supra*. Later, that very same goodwill became quite dispensable to the government solely because it would be "valueless" if the government ever had to liquidate the thrifts that it had sold to respondent. So the government repudiated the very regulatory capital promises that had induced respondents' acquisition and ordered respondents either to replace the supervisory goodwill and capital credit with hard cash or to return the thrifts, along with their multi-million investments, to the government. In short, by repudiating its regulatory capital promises, the government retroactively transferred to respondents the government's obligation, as deposit insurer, to make good on the losses suffered by the acquired thrifts.

The government's regulatory capital promises in this case are thus no less financial, and its breach no less consequential, than if the government had induced respondents' supervisory acquisitions with a promissory note rather than intangible capital, and then canceled the note and seized the thrifts as undercapitalized. Accordingly, the reserved powers doctrine would not in any event shield the government from enforcement of its regulatory capital promises according to their terms. *See, e.g., Lynch*, 292 U.S. at 579; *Perry*, 294 U.S. at 352. *See also Hodel v. Irving*, 481 U.S. 704 (1987); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *Choate v. Trapp*, 224 U.S. 665 (1912).

5. In sum, Statesman and Winstar specifically bargained for and received express regulatory capital promises from the thrift regulators in return for their agreements to infuse substantial sums of money into the acquired thrifts and to assume liabilities that far exceeded the thrifts' assets. Statesman and Winstar took care to ensure that the government's regulatory capital promises were expressly contained in "documents [that] were integrated and cross-referenced, in textbook compliance with the rules of contract." Pet. App. 95a (Newman, J., dissenting). The intent of the contracting parties regarding regulatory capital is clear from the contract documents, the negotiating records, the government's internal analyses of the transactions, the parties' course of dealing until enactment of FIRREA, and common sense. No doctrine of contract construction, including the unmistakability doctrine, requires a court to interpret an agreement in a manner that negates the clear intent of the contracting parties, as the government invites this Court to do here. Indeed, Congress found these and similar contracts unmistakable enough; during consideration of FIRREA, both supporters and opponents of the legislation in Congress understood and acknowledged that FIRREA's goodwill provisions would violate existing

government contracts like respondents.[25] And the Comptroller General warned Congress that enactment of those provisions would expose the government "to potentially enormous financial liability" for both breach of contract and uncompensated takings. Comptroller General Op. B-240860 (Aug. 27, 1990) (J.A. 515). The government assumed the risk of future regulatory change, and now it must pay damages for its breach.

II. THE THRIFT REGULATORS HAD EXPRESS STATUTORY AUTHORITY TO ENTER INTO STATESMAN'S AND WINSTAR'S CONTRACTS.

It is true, as the government states, that nothing in the laws relating to thrift institutions "grant[ed] FSLIC or the Bank Board the authority to commit Congress not to modify the governing statutes." Pet. Br. 41. Indeed, we are certain

---

[25] *See, e.g.*, H.R. Rep. No. 54, 101st Cong., 1st Sess., pt. 1, 432 (1989) (defining supervisory goodwill, and then noting that "[a]ny other goodwill resulting from the acquisition, merger, consolidation, purchase of assets or other business combination that is not covered by a *specific contractual understanding or agreement with the Bank Board* is not included as a component of capital") (emphasis added); *id.* at 497-98 (additional views of Mr. Annunzio, Mr. Kanjarski, and Mr. Flake) ("The Committee's [treatment of supervisory goodwill] is the same as the government asking a man to enlist in the Army for hazardous duty overseas and then suing him for deserting his wife and children. . . . Simply put, the Committee has reneged on the agreements that the government entered into concerning supervisory goodwill."); *id.* at 507-08 (additional views of Mr. LaFalce) ("Those institutions which carry intangible assets on their books do so generally under written agreements they have entered into with the U.S. government, agreements which generally state that they cannot be superseded by subsequent regulations."); *id.* at 534 (additional views of Representatives Hiler, Ridge, Bartlett, Dreier, McCandless, Saiki, Baker, and Paxon). *See also* 135 Cong. Rec. H2706 (daily ed. June 15, 1989) (statement of Rep. Crane) (FIRREA "would require these S&Ls to write off this goodwill in a scant five years. This legislation violates the present agreements that these institutions made with the Federal Government."); *id.* at H2783 (daily ed. June 15, 1989) (statement of Rep. Ackerman) (FIRREA "would abrogate written agreements made by the U.S. Government to thrifts that acquired failing institutions. . . . In effect, the Government is saying, 'Thanks for your help, but we don't need you anymore, so we're breaking our promise.' "); *id.* at H2717 (daily ed. June 15, 1989) (Statement of Rep. Rostenkowski) ("The contracts between the savings and loan owners when they acquired failing institutions in the early 1980's are not contracts written in stone.").

that there is no provision in the *United States Code* granting such a power to any federal agency. And we cannot imagine that such a law would be upheld if one did exist. As we have demonstrated above, however, the unmistakability doctrine, properly understood, requires nothing more to bind the government than a clearly expressed contractual promise, not a further commitment that the promise will either be honored by Congress or specifically enforced despite enactment of contrary legislation. Thus, the fact that the thrift laws do not contain a provision delegating to the thrift regulators' authority to make such a commitment is quite beside the point.

There is no doubt that the thrift regulators had ample statutory authority to enter into the contracts at issue here. As the court of appeals noted, the FSLIC has always had express statutory power "[t]o make contracts." Pet. App. 39a (quoting 12 U.S.C. § 1725(c)(3) (1988) (repealed by FIRREA)).[26] That nothing more is required is a central premise of the Tucker Act, whose purpose, according to Judge Learned Hand, was "to assume liability for the acts of such of [the government's] agents as had the power in the discharge of their duties to assume or refuse engagements on the faith of which other citizens should rely." *Heil*, 273 F. at 731.

III. THE SOVEREIGN ACTS DOCTRINE DOES NOT EXCUSE THE GOVERNMENT'S LIABILITY IN DAMAGES FOR ITS BREACH OF ITS CONTRACTUAL OBLIGATIONS.

1. As a final safe harbor from liability for its contract breach, the government offers the sovereign acts doctrine, which excuses the government from contract liability when its

[26] *See also* 12 U.S.C. § 1729(f)(2)(A), (3) (1988) (repealed by FIRREA) (granting authority to FSLIC, "in its sole discretion and upon such terms and conditions as [it] may prescribe," to agree to specified forms of assistance in order to facilitate the merger or acquisition of a failing institution); 12 U.S.C. § 1725(d) (1988) (repealed by FIRREA) (authorizing FSLIC "to borrow money, and to issue notes, bonds, debentures, or other such obligations upon such terms and conditions as the [Bank Board] may determine.").

performance is "incidentally" impaired by its *unrelated* "public and general acts as a sovereign." *Horowitz v. United States*, 267 U.S. 458, 461 (1925). The Federal Circuit concluded that the sovereign acts doctrine did not apply in these cases primarily because it was "convinced . . . that the FIRREA provisions at issue here targeted thrifts that had undergone supervisory mergers, financed in part with supervisory goodwill, with the approval and assistance of the federal government." Pet. App. 45a. As a result, no "public and general" sovereign act was involved that could trigger the immunity of the doctrine.

The government quarrels with this conclusion of the Federal Circuit on several, equally unmeritorious, grounds. The government first contends that FIRREA qualifies as a "public and general" sovereign act because it "instituted a comprehensive overhaul of the regulation of the entire thrift industry," Pet. Br. 44, and so was enacted "to govern regulatory policy and to advance the general welfare." Pet. Br. 45. The Federal Circuit provided the complete answer to this argument, observing that the relevant provisions of FIRREA were not any less targeted at the parties to supervisory mergers because they were packaged in a much larger, "comprehensive" piece of legislation. Pet. App. 44a. Moreover, the court of appeals pointed out that the good motives of Congress in enacting FIRREA did not somehow distinguish the relevant parts of FIRREA and make them "general" for purposes of the sovereign acts doctrine; presumably every act of Congress is intended to advance the public welfare. Pet. App. 45a. *See United States Trust*, 431 U.S. at 29 ("a State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors").

The government further argues that the Federal Circuit's rejection of the sovereign acts doctrine – based on the conclusion that FIRREA's "principal effect is to abrogate specific contractual rights," Pet. App. 40a – is wrong because FIRREA provided a "transition" that phased out supervisory goodwill over several years rather than eliminating it all at once. Pet. Br. 45-46. As a result, the government claims,

FIRREA actually placed thrifts like Statesman and Winstar in a *better* position than other institutions. *Id.* at 45.

Taken at face value, such an argument turns a blind eye to the actual impact of FIRREA, as well as to the text and legislative history of the statute itself. For Winstar and Statesman, there was no "transition" period; their thrifts were seized within a few months of the date on which FIRREA's restrictions on supervisory goodwill became effective. The government certainly will have a hard time convincing Statesman and Winstar that FIRREA placed them in a *better* position than anyone else.

At bottom, the government strains to avoid the clear focus of FIRREA and its legislative history on the goodwill contracts – as the *in banc* Federal Circuit, and Judge Newman dissenting from the panel decision, explained, Pet. App. 41a-44a, 95a-98a – by employing a *non sequitur*. The fact that the restrictions on the use of supervisory goodwill were phased in hardly negates the undeniable fact that those restrictions were targeted at this particular intangible asset created only by contracts with the government.

2. To apply the sovereign acts doctrine as the government urges here would transform the doctrine into a radical instrument of government lawlessness, at war both with this Court's precedents and with the attributes of sovereignty itself. As previously discussed, this Court has long recognized that "the right to make binding obligations is a competence attaching to sovereignty." *Perry*, 294 U.S. at 353. Consequently, the Federal Circuit was correct in describing the bounds of the sovereign acts doctrine: "[W]e know of no authority for . . . [the proposition] that the government has a sovereign right to disavow its contractual obligations through comprehensive national legislation." Pet. App. 45a. *See also Freedman v. United States* 320 F.2d 359, 366 (Ct. Cl. 1963) ("The doctrine of 'public and general' 'sovereign acts,' laid down in *Horowitz* . . . does not relieve the Government from liability where it has specially undertaken to perform the very act from which it later seeks to be excused."); *Hills Materials Co. v. Rice*, 982 F.2d 514, 516 n.2 (Fed. Cir. 1992). To the

contrary, "Congress was without power to reduce expenditures by abrogating contractual obligations of the United States." *Lynch*, 292 U.S. at 580.

The issue addressed by the sovereign acts doctrine, it must be remembered, arises only in circumstances where the "dual capacities" of the government as sovereign and as a participant in commerce are manifestly distinct. In *Horowitz*, for example, a government agency that had entered a contract to sell surplus silk could not comply with Horowitz' request to ship the silk by freight due to a subsequent rail embargo. In denying Horowitz' claim against the government for loss caused by the resulting delay in shipment, this Court explained:

> The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused . . . . In this court the United States appear simply as contractors; and they are to be held liable only within the same limits that any other defendant would be in any other court. Though their sovereign acts performed for the general good may work injury to some private contractors, such parties gain nothing by having the United States as their defendants.

Horowitz, 267 U.S. at 461, quoting *Jones v. United States*, 1 Ct. Cl. 383, 384 (1865).

The operating premise of the sovereign acts doctrine is that, where the federal government is acting in distinct capacities as sovereign and as a contractor, in its role as a contractor it is entitled to be treated as if it were a private contracting party – no better, no worse. It follows that to determine whether the government's breach of a contract is excused under the sovereign acts doctrine, "a citizen or corporate body must by supposition be substituted in its place, and then the question be determined whether the action will lie against the supposed defendant." *Jones v. United States*, 1 Ct. Cl. at 385. In *Horowitz*, the silk contract contained no provision concerning shipment by freight or otherwise allocating the risk of a future event like the embargo, and so Horowitz would not

have been entitled to recover his loss against a private contractor. As a result, he was not entitled to recovery against the government.

Under this analysis, when a contracting party – whether a private party or a government agency – in effect assumes the risk that a change in the law will not occur, and that change does occur so as to impair contract performance, the party that assumed that risk will be liable in damages. Nothing in the sovereign acts doctrine either bars the government as a contractor from assuming such a risk or subsequently operates to immunize it from the consequences of such an obligation, whether or not the legislation involved is "public and general." In *Perry*, for example, Congress acted pursuant to its power "to regulate the value of money," 294 U.S. at 350, to declare provisions in not only government contracts, but in *any* contract, requiring payment in gold to be "against public policy." *Id.* at 349. It is difficult to imagine a statute with broader application. Yet the Court rejected the notion that this power allowed Congress to "disregard the obligations of the Government at its discretion," *id.* at 350, or to otherwise "alter or repudiate the substance of its own engagements." *Id.* at 351. So, too, in *Lynch*, the law breaching the government's contract was a repeal of "[a]ll laws granting or pertaining to" certain insurance policies. 292 U.S. at 575. Though Congress clearly had the power to issue such insurance, *id.* at 579, at the same time "Congress was without power to reduce expenditures by abrogating contractual obligations of the United States." *Id.* at 580.[27]

---

[27] *See also Hills Materials*, 982 F.2d at 516 n.2 ("[T]he [sovereign acts] doctrine certainly does not prevent the government as contractor from affirmatively assuming responsibility for specific sovereign acts."); *Amino Bros. Co. v. United States*, 372 F.2d 485, 491 (Ct. Cl.), *cert. denied*, 389 U.S. 846 (1967) ("The government cannot make a binding promise that it will not exercise a sovereign power, but it can agree in a contract that if it does so, it will pay the other contracting party the amount by which its costs are increased by the Government's sovereign act.").

In its contracts with Statesman and Winstar, the government agreed to assume precisely this risk that future regulatory changes would not interfere with the promised regulatory treatment of supervisory goodwill and capital credits. Accordingly, the sovereign acts doctrine can erect no bar to the government's liability in damages to Statesman and Winstar for its breaches of the contracts with them.

The inapplicability of the sovereign acts doctrine is even more apparent when, as is the case here, a clear distinction cannot be drawn as to whether the government is acting in its sovereign or regulatory capacity on the one hand, or its capacity as a participant in commerce on the other. Indeed, the blurring of this distinction with the rise of the modern regulatory state has long been recognized.[28] The contracts with Statesman and Winstar provide a clear example. A government agency, acting as an insurer, and animated by financial concerns similar to those of any other insurer, needed to relieve itself of the vast liability created by insolvent thrifts that was driving the agency itself into insolvency. As a result, the agency entered the marketplace to find buyers for those thrifts who would assume that liability – clearly a commercial endeavor.[29] Yet certain of the contractual promises made to effect these transactions, part of the price paid by the agency, were promises to accord specified *regulatory* treatment to respondents' supervisory goodwill and capital credit, promises that obviously could not have been made by a private party. Only the government could have made such a contractual promise, and only the government could have breached it.

---

[28] *See, e.g., Sunswick Corp. v. United States*, 75 F. Supp. 221, 228 (Ct. Cl.), *cert. denied*, 334 U.S. 827 (1948) ("We know of no reason why the Government may not by the terms of its contract bind itself for the consequences of some act on its behalf which, but for the contract, would be nonactionable as an act of the sovereign.").

[29] This point is discussed more fully in the brief filed in this case by *amici* Keystone Holdings, Inc. and American Savings Bank, F.A.

Surely the sovereign acts doctrine does not permit the government to escape damages liability for rendering impossible (by changing the law) its own performance of a contractual promise that only it could have made. Excusing a deliberate breach of such a governmental promise would contradict rather than serve the purpose of the sovereign acts doctrine. As one commentator recently put it:

> In such cases, the party that entered into the contract – the government as lawgiver or regulator – and the party that impaired the contract by enacting a sovereign act – the government as lawgiver or regulator – are the same. Instead of providing the government with as much protection under contract law as private parties enjoy, shielding the regulatory state from contract liability would allow the government as lawgiver or regulator to breach its contracts freely.

Recent Cases, 109 Harv. L. Rev. 1162, 1167 (1996).

3. Finally, the government does not even try to justify the unconscionably unfair consequences of applying the sovereign acts doctrine in this case. The government, as a direct result of its repudiation of its contractual obligations, seized Statesman's and Winstar's thrifts, along with the substantial cash capital infusions ($21 million and $2.8 million, respectively) that they had made in the thrifts in direct reliance on the government's promises. The government would invoke the sovereign acts doctrine not only to excuse its breach, but also to retain Statesman's and Winstar's money as well. No sovereign acts case, of course, supports such a result.

To the contrary, American law is far more solicitous of elementary notions of fairness than the government is willing to admit. Even when an agency's contractual promise cannot be enforced – for example, because it was unlawful or unauthorized at the time it was made – the benefits conferred on the government and costs incurred by the private party in reliance on the promise must be reimbursed, on application of a *quantum meruit* or *quantum valebant* analysis, to put the contracting parties "substantially in the position they would

have occupied without the attempted contract . . . . " *New York Mail & Newspaper Transp. Co. v. United States*, 154 F. Supp. 271, 276 (Ct. Cl.), *cert. denied*, 355 U.S. 904 (1957).

For example, in *United States v. Amdahl Corp.*, 786 F.2d 387, 393 (Fed. Cir. 1986), the Federal Circuit held that the government must return the value of benefits received even under a contract that was properly terminated by the government for illegality:

> Where a benefit has been conferred by the contractor on the government in the form of goods or services, which it accepted, a contractor may recover at least on a *quantum valebant* or *quantum meruit* basis for the value of the conforming goods or services received by the government prior to the rescission of the contract for invalidity.[30]

Clearly Statesman and Winstar are entitled, at a minimum, to return of the money and other benefits they provided to the government in reliance on promises that were validly made, but whose performance was later rendered impossible by contrary legislation.

---

[30] *See also Prestex Inc. v. United States*, 320 F.2d 367, 373 (Ct. Cl. 1963) ("Even though a contract be unenforceable . . . , it is only fair . . . that the Government pay for goods delivered or services rendered and accepted under it."); *Yosemite Park & Curry Co. v. United States*, 582 F.2d 552, 560 (Ct. Cl. 1978) ("[W]hile . . . the Government could [not] be bound by . . . Agreement, . . . the Government bargained for, agreed to pay for, and received the benefit of [the contractor's] services . . . . "); *Ocean Technology, Inc. v. United States*, 19 Cl. Ct. 288, 293 (1990) ("It would be manifestly unfair, at this late date, for [the government] to retain the benefits of the [contractor's product] . . . while renouncing its contractual obligations.").

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

CHARLES J. COOPER
Counsel of Record
MICHAEL A. CARVIN
ROBERT J. CYNKAR
VINCENT J. COLATRIANO
SHAW, PITTMAN, POTTS
& TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

March 29, 1996

[redacted]

[redacted]

[redacted]

QUESTIONS PRESENTED

1. Did the government's contractual obligations include a commitment that Glendale Federal Bank could use goodwill as capital amortized over 40 years, in lieu of cash assistance, to offset the excess liabilities of a failing thrift and thereby make Glendale's merger with that thrift financially feasible?

2. Did the Federal Savings and Loan Insurance Corporation have authority to incur this contractual obligation?

3. Is the United States liable in damages for its failure to perform its contractual obligation?

RULE 29.6 STATEMENT

Respondent Glendale Federal Bank, FSB has no parent or subsidiary companies (other than wholly owned subsidiaries).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
STATUTORY PROVISIONS AND COURT RULE INVOLVED	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	12
ARGUMENT	15
I. THE GOVERNMENT'S CONTRACT CLEARLY RECOGNIZED GLENDALE'S RIGHT TO USE GOODWILL FOR CAPITAL IN ACCORDANCE WITH GAAP	16
1. The Financial Contract Here Does Not Infringe The Government's Sovereign Authority, And Therefore The Unmistakability Principle Does Not Apply	16
2. Even If Unmistakability Applies, It Is Satisfied In This Case, As Both Courts Below Found	18
a. Unmistakability Addresses Intent, Not Formality	18
b. Unmistakability Is More Easily Satisfied When A Contract Clearly Exists And The Only Question Is Its Scope	19
3. The Government's Clear Intent Is Evident From The Terms Of The Agreement, The Value Of The Consideration Provided By Glendale, And The Undisputed Facts	20

TABLE OF CONTENTS—Continued

	Page
a. The Contract Language Establishes The Government's Clear Intent	20
b. The Contract Does Not Authorize The Government To Impose Contrary Goodwill Accounting Requirements	24
c. Unmistakability Requires Only One Contract Promise, Not Two	26
d. The Value Of The Consideration Provided By Glendale Demonstrates The Government's Clear Contractual Intent	29
e. The Uncontroverted Facts "Establish" The Government's Clear Contractual Intent	32
4. The Decisions On Which The Government Relies Are Inapposite	34
II. THE INSURANCE CORPORATION HAD AMPLE EXPRESS STATUTORY AUTHORITY TO ENTER INTO GLENDALE'S CONTRACT	36
III. THE "SOVEREIGN ACTS" DEFENSE IS INAPPLICABLE TO GLENDALE'S CLAIM FOR CONTRACT DAMAGES	44
CONCLUSION	50
APPENDIX	A1-A4

TABLE OF AUTHORITIES

CASES:	Page
American Smelting & Ref. Co. v. Colorado ex rel. Lindsley, 204 U.S. 103 (1907)	38
Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)	34
Appleby v. City of New York, 271 U.S. 364 (1926)	38
Appleby v. Delaney, 271 U.S. 403 (1926)	30
Atlantic Coast Line R.R. v. City of Goldsboro, 232 U.S. 548 (1914)	38
Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986)	34, 35
Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co., 111 U.S. 746 (1884)	38-39
CFTC v. Schor, 478 U.S. 833 (1986)	43
Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)	43
City of Cleveland v. Cleveland City Ry. Co., 194 U.S. 517 (1904)	43
Columbia Ry., Gas & Elec. Co. v. South Carolina, 261 U.S. 236 (1923)	19
Contributors to the Pa. Hosp. v. City of Phila., 245 U.S. 20(1917)	39
Craft Machine Works, Inc. v. United States, 926 F.2d 1110 (Fed. Cir. 1991)	23
Cramp Shipbuilding Corp. v. United States, 122 Ct. Cl. 72 (1952)	24
De La Rama S.S. Co. v. United States, 344 U.S. 386 (1953)	48
Detroit United Ry. v. Michigan, 292 U.S. 238 (1916)	49
Detroit v. Detroit Citizens' St. Ry., 184 U.S. 368 (1902)	25, 28, 29, 30, 32
Douglas v. Kentucky, 168 U.S. 488 (1897)	38
Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810)	26
Freedman v. United States, 320 F.2d 359 (Ct. Cl. 1963)	50
Gould v. United States, 67 F.3d 925 (Fed. Cir. 1995)	50

TABLE OF AUTHORITIES—Continued

Page

Hills Materials Co. v. Rice, 982 F.2d 514 (Fed. Cir. 1992) 26, 50
Hollerbach v. United States, 233 U.S. 165 (1914) .. 20
Home Tel. & Tel. Co. v. City of Los Angeles, 211 U.S. 265 (1908) 42, 43, 44
Horowitz v. United States, 267 U.S. 458 (1925) .. 45, 48, 49
Horton v. United States, 57 Ct. Cl. 395 (1922) 34
Hughes Communications Galaxy, Inc. v. United States, 998 F.2d 953 (Fed. Cir. 1993) 23, 26
Humphrey v. Pegues, 83 U.S. (16 Wall.) 244 (1872) 21, 30, 32
Jessup v. United States, 106 U.S. 147 (1882) 15, 42
Landgraf v. USI Film Prods., 114 S. Ct. 1483 (1994) 15, 47
Lynch v. United States, 292 U.S. 571 (1934) ..... *passim*
Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 34
Mississippi ex rel. Robertson v. Miller, 276 U.S. 174 (1928) 19
Missouri, K. & T. Ry. v. Oklahoma, 271 U.S. 303 (1926) 25
Moses v. United States, 166 U.S. 571 (1897) 42
Murray v. Charleston, 96 U.S. 432 (1877) 28
New Jersey v. Yard, 95 U.S. 104 (1877) 28
New Orleans Gas Light Co. v. Louisiana Light & Heat Prod. & Mfg. Co., 115 U.S. 650 (1885) ... 17, 29, 30, 38
New York Airways, Inc. v. United States, 369 F.2d 743 (Ct. Cl. 1966) 42
O'Melveny & Myers v. FDIC, 114 S. Ct. 2048 (1994) 36, 48, 49
Perry v. United States, 294 U.S. 330 (1935) ..... *passim*
Powers v. Detroit, G.H. & M. Ry., 201 U.S. 543 (1906) 28, 30
Priebe & Sons v. United States, 332 U.S. 407 (1947) 20
Providence Bank v. Billings, 29 U.S. (4 Pet.) 514 (1830) 19
Reading Steel Casting Co. v. United States, 268 U.S. 186 (1925) 20

TABLE OF AUTHORITIES—Continued

Page

Russell v. Sebastian, 233 U.S. 195 (1914) ..... *passim*
St. Anna's Asylum v. New Orleans, 105 U.S. 362 (1882) 28
St. Cloud Pub. Serv. Co. v. City of St. Cloud, 265 U.S. 352 (1924) 38
Stone v. Mississippi, 101 U.S. 814 (1880) 39
The Binghamton Bridge, 70 U.S. (3 Wall.) 51 (1865) ..... *passim*
The Delaware R.R. Tax, 85 U.S. (18 Wall.) 206 (1873) 32, 33
The Twenty Per Cent. Cases, 87 U.S. (20 Wall.) 179 (1873) 47-48
United States Nat'l Bank v. Independent Ins. Agents of Am., Inc., 113 S. Ct. 2173 (1993) 48
United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) 14, 17, 37, 39, 46-47
United States v. Bekins, 304 U.S. 27 (1938) 38
United States v. Bethlehem Steel Corp., 315 U.S. 289 (1942) 20
United States v. Bostwick, 94 U.S. 53 (1876) 50
United States v. Cherokee Nation, 480 U.S. 700 (1987) 34, 35
United States v. Gibbons, 109 U.S. 200 (1883) 32, 35-36
United States v. Larionoff, 431 U.S. 864 (1977) 47
United States v. Purcell Envelope Co., 249 U.S. 313 (1919) 14, 28, 30, 36
United States v. Security Indus. Bank, 459 U.S. 70 (1982) 47
United States v. Standard Rice Co., 323 U.S. 106 (1944) 20, 27, 29
United States v. Tingey, 30 U.S. (5 Pet.) 115 (1831) 42
Vicksburg v. Vicksburg Waterworks Co., 206 U.S. 496 (1907) 43
Von Hoffman v. City of Quincy, 71 U.S. (4 Wall.) 535 (1867) 24
W.B. Worthen Co. v. Kavanaugh, 295 U.S. 56 (1935) 38

TABLE OF AUTHORITIES—Continued

	Page
W.R. Grace Co. v. Rubber Workers, 461 U.S. 757 (1983)	25, 29, 45
Walla Walla v. Walla Walla Water Co., 172 U.S. 1 (1898)	30
White v. United States, 241 U.S. 149 (1916)	32
Willard, Sutherland, & Co. v. United States, 262 U.S. 489 (1923)	34
Wood v. Lovett, 313 U.S. 362 (1941)	24, 38
CONSTITUTION, STATUTES AND REGULATIONS:	
U.S. Const. art. I, § 8, cl. 2	37
Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (codified at 12 U.S.C. § 1464, *et seq.* (1994)) ("FIRREA")	*passim*
12 U.S.C. § 1464(t)(3)(A)	46
12 U.S.C. §§ 1464(t)(9)(A), (C)	46
National Housing Act of 1934, Pub. L. No. 73-479, 48 Stat. 1246 (1934) (codified as amended at 12 U.S.C. §§ 1701 *et seq.* (1988))	2
12 U.S.C. § 1724 (repealed 1989)	2
12 U.S.C. § 1725(a) (repealed 1989)	3
12 U.S.C. § 1725(c)(3) (1976) (repealed 1989)	2, 15, 40, 41
12 U.S.C. § 1728 (repealed 1989)	2
12 U.S.C. § 1729(b)-(f) (repealed 1989)	2
12 U.S.C. § 1729(f)(2) (Supp. V 1982) (repealed 1989)	2-3, 15, 40, 44
12 U.S.C. § 1437(a) (1988) (repealed 1989)	42
10 U.S.C. § 7522(a) (1994)	40
15 U.S.C. § 2703(b) (1994)	40
20 U.S.C. § 1442 (1994)	40-41
28 U.S.C. § 1491 (1994)	19
31 U.S.C. § 1341 (1994)	42
41 U.S.C. § 11 (1994)	42

TABLE OF AUTHORITIES—Continued

	Page
49 U.S.C. § 1113(b)(1)(H) (Supp. 1995)	41
12 C.F.R.:	
Section 563.13 (1981)	23
Section 563.13(b) (1981)	4
Section 567.5(a)(2) (1990)	9
Section 567.9(c) (1990)	9, 44
R.C.F.C. 56	14, 33
MISCELLANEOUS:	
Accounting Principles Board Op. No. 16 ¶ 66 (1970)	3
The American Heritage Dictionary 1267 (1976)	23
Black's Law Dictionary 1269 (5th ed. 1979)	23
135 Cong. Rec.:	
H2703	4
H2706	3
H2783	46
6 *Corbin on Contracts* (1962)	50
2 E. Farnsworth, *Farnsworth on Contracts* (1990)	29
45 Fed. Reg. 72,681 (1980)	29
46 Fed. Reg. 42,274 (1981)	29
47 Fed. Reg. 8152 (1982)	23
51 Fed. Reg. 16,550 (1986)	23
H.R. Rep. No. 54(I), 101st Cong., 1st Sess. (1989)	4, 9, 46,47
Restatement (Second) of Contracts § 202(1) (1981)	19
Restatement (Second) of Contracts § 272 (1981)	50
4 S. Williston, *A Treatise on the Law of Contracts* § 628 (3d ed. 1961)	21
C. Wright & A. Miller, *Federal Practice & Procedure* § 2716 (1983 & Supp. 1995)	33

STATUTORY PROVISIONS AND COURT RULE INVOLVED

The relevant provisions of two statutes and a United States Court of Federal Claims Rule are set forth in the appendix included at the end of this brief.

STATEMENT OF THE CASE

This case involves three separate actions that were consolidated for appeal by the Court of Federal Claims.[1] This brief is filed on behalf of Glendale Federal Bank, FSB, respondent in one of the consolidated actions.

1. In 1981 the government entered into a contract with Glendale Federal Bank pursuant to which Glendale agreed to assume, through a merger, the government's financial liability for a failing Florida thrift, First Federal Savings and Loan Association of Broward County ("Broward"). At the time, Broward was insolvent, and its excess liabilities of $734 million represented a direct demand on the government's deposit insurance fund. Glendale's agreement to assume Broward's liabilities allowed the government to avoid seizing Broward, saving the government, by its own estimate, more than $783 million in liquidation costs. To induce Glendale to acquire Broward, the government promised Glendale that Broward's excess liabilities would be offset—not by cash assistance, which the government was unable to provide, but with a comparable asset, "goodwill," which Glendale could amortize over 40 years.

Glendale has *fully* performed its own contract obligations. It assumed financial responsibility for Broward's $734 million in excess liabilities, and thereby completely *eliminated* the government's insurance exposure of more than $783 million arising from Broward's previously imminent failure. In 1989, however, the government repudiated its part of the bargain and required Glendale im-

[1] Throughout the trial court proceedings, that court was known as the United States Claims Court; for convenience, this brief nevertheless refers to the trial court by its current name, the Court of Federal Claims.

mediately to deduct a major portion of the contractually-promised goodwill from its books and to eliminate the rest within five years. Both courts below held, based on the language of Glendale's contract and the uncontroverted facts of record, that the government thereby breached its "express contractual obligation," Pet. App. 17a, to Glendale and is therefore liable for damages.

2. In arguing otherwise, the government's brief completely ignores the most significant federal role with respect to this case: that of deposit insurance provider. Under the National Housing Act of 1934 ("Act"),[2] the government chartered and operated the Federal Savings and Loan Insurance Corporation ("Insurance Corporation" or "FSLIC"), which insured deposit accounts at savings and loans (or "thrifts"), upon payment of premiums and other costs. 12 U.S.C. § 1724 (1988) (repealed 1989). In the Act, Congress provided depositors with an enforceable right to obtain deposit insurance proceeds upon the default of an insured institution. 12 U.S.C. § 1728 (1988) (repealed 1989).

To secure depositors' insurance rights, the Act gave the Insurance Corporation broad authority to protect its deposit insurance fund, including the authority, upon default of an insured thrift, to take over and operate the institution, to provide it with financial assistance, to liquidate it, to merge it with another insured institution, or to take other appropriate actions. 12 U.S.C. § 1729(b)-(f) (1988) (repealed 1989). At the time of the Glendale/Broward merger in 1981, the Act broadly authorized the Insurance Corporation "[t]o make contracts," 12 U.S.C. § 1725(c)(3) (1976) (repealed 1989), and also specifically authorized it, "in order to facilitate a merger" of a failing thrift with another insured institution, to "*guarantee* such other insured institution *against loss* by reason of its merging . . . with" the failing thrift. 12

[2] Pub. L. No. 73-479, 48 Stat. 1246 (1934) (codified as amended at 12 U.S.C. §§ 1701-1750g (1988)).

U.S.C. § 1729(f)(2) (Supp. V 1982) (amending 12 U.S.C. § 1729(f) (1976)) (repealed 1989) (emphasis added).

3. Beginning in the late 1970's, rampant inflation and related high interest rates caused an unprecedented number of thrift institutions to fail. In an effort to avoid liquidations accompanied by costly insurance payouts, the Insurance Corporation and its operating head, the Federal Home Loan Bank Board (the "Bank Board" or "FHLBB"), *see* 12 U.S.C. § 1725(a), began to encourage healthy thrifts to merge with failing ones.[3] Because the government had no authority to force healthy thrifts to engage in such mergers, and because the failing thrifts were by definition insolvent, the Insurance Corporation had to provide sufficient consideration to induce healthy thrifts to merge with failing thrifts. The forms of consideration available to the Insurance Corporation included direct cash assistance, which it provided to facilitate many early mergers. *See* C.A. App. 1744; *see also* Pet. App. 5a. However, in light of the large number of failing thrifts, by 1981 the Insurance Corporation could no more afford cash-assisted mergers than it could afford the cost of paying off depositors in liquidations. C.A. App. 1751. Therefore, the Insurance Corporation used its statutory contracting powers to provide non-cash inducements.

Chief among the available cash substitutes was the government's mandated use of goodwill and the "purchase method" of accounting, which is a generally accepted accounting principle ("GAAP") used to account for business combinations in all industries.[4] Under the purchase method of accounting, the surviving entity in a merger records as "goodwill" any excess of the purchase price (including, as here, the liabilities assumed) over the fair

[3] C.A. App. 1749 (statement of Richard T. Pratt). *See also* 135 Cong. Rec. H2706 (daily ed. June 15, 1989) (statement of Rep. Crane) ("these acquisitions saved the government at least $13 billion" in the 1980s).

[4] *See* Accounting Principles Board Op. No. 16 ¶ 66 (1970).

value of the acquired company's assets. *See* Pet. App. 6a; J.A. 575-77. Goodwill is an asset which, like other assets, is amortized (*i.e.*, deducted from earnings) incrementally over a specified time period. J.A. 572. The appropriate amortization period is determined on a case-by-case basis, although in 1981 GAAP required a fixed period of up to 40 years. *Id.* at 573.

Through use of purchase method accounting, the Insurance Corporation was able to facilitate workable mergers of failing thrifts with healthy ones even while it was cash poor. A thrift's net worth (or capital, *see infra* note 16) determined the amount of income-producing loans and other assets the thrift could hold. *See* 12 C.F.R. § 563.13 (b) (1981). Therefore, recognition of goodwill as part of net worth permitted the acquiring thrift to hold, over the amortization period, a greater amount of income-producing assets and thereby to obtain greater earnings. *See* H.R. Rep. No. 54(I), 101st Cong., 1st Sess. 533 (1989). These increased future earnings, which the acquiring thrifts were able to obtain under the Insurance Corporation's goodwill agreements, both (a) compensated the acquiring thrifts for assuming the government's deposit insurance liabilities, and (b) reduced, over time, the Insurance Corporation's insurance risk on the deposits of the surviving thrifts by replacing the gradually-amortizing goodwill with newly-generated retained earnings. *See id.* at 498. This process was particularly effective where, as here, the government's contracting partner was a healthy, well-run institution with substantial pre-existing net worth. The process also allowed the Insurance Corporation to conserve its dwindling cash for use when liquidations were unavoidable.[5]

As former Bank Board Chairman Richard Pratt testified to Congress:

[5] *E.g.*, C.A. App. 1744 (excerpt, GAO Report to Congress) ("The innovative assistance methods initiated by FSLIC in 1981 minimized FSLIC's immediate cash outlays."); *see* 135 Cong. Rec. H2703 (daily ed. June 15, 1989) (statement of Rep. Hyde) (goodwill was used by the Insurance Corporation as "an inducement to the healthy savings and loans to merge with the sick ones").

> The Bank Board . . . did not have sufficient resources to close all insolvent institutions, [but] at the same time, it had to consolidate the industry, move weaker institutions into stronger hands and do everything possible to minimize losses during the transition period. *Goodwill was an indispensable tool in performing this task.*

C.A. App. 1751 (emphasis added).

4. In September 1981, Glendale was approached about merging with Broward, Pet. App. 8a, which then had liabilities that exceeded the fair value of its assets by more than $734 million, J.A. 644, and which had been losing millions of dollars per month for some time. *Id.* at 634, 644. The Insurance Corporation projected that Broward soon would fail; it therefore faced an enormous impending liability, and, unless some alternative solution were found, estimated it would incur real cash costs to liquidate Broward of more than $783 million. *Id.* at 615.[6]

Glendale was then, and always had been, both profitable and well-capitalized. *Id.* at 636. Glendale's net worth prior to the Broward merger was $277 million, or 5.45% of its total assets, well in excess of the 4% that the Insurance Corporation then required. *See* C.A. App. 1764. Even so, Glendale's capital was inadequate—by hundreds of millions of dollars—to absorb Broward's $734 million capital deficiency. Glendale, therefore, could not even have considered the merger unless the Insurance Corporation provided sufficient consideration to offset Broward's crippling excess liabilities. J.A. 645.

As a result of their negotiations, the government and Glendale focused on use of purchase method accounting and resulting goodwill to provide the necessary considera-

[6] In fact, the immediate cash demand would have been far greater. The Insurance Corporation projected an initial cash outlay of $1.8 billion to pay Broward's depositors and other creditors, followed by the eventual recoupment of about $1 billion through sales of Broward's loans and other assets. *See* J.A. 586.

tion. *Id.* at 635. Glendale explored a possible cash contribution, in lieu of some or all goodwill, *see* C.A. App. 1823, but the government never pursued that alternative. J.A. 635, 644-45. Accordingly, when Glendale and the Insurance Corporation reached an agreement in principle in October 1991, the parties agreed to financial terms that ultimately required no assistance from the government other than its commitment to allow Glendale the use of goodwill amortized over 40 years. *Id.* at 635-36. The only other financial term of the agreement was a provision partially protecting *both* parties from interest rate fluctuations. *Id.* at 591-93. Pursuant to that provision, Glendale later *paid* the Insurance Corporation $18.24 million. *Id.* at 646.

Glendale negotiated and obtained the government's agreement to the longest permissible amortization period under GAAP—40 years for most of the goodwill, and 12 years for a small portion. *Id.* at 629-34, 636-37, 640.[7] Had the government agreed only to a shorter amortization period—and thus a shorter period of increased future assets and earnings for Glendale, *see supra* p. 4—Glendale would have required additional consideration in cash or some other form, if it were willing to proceed with the Broward merger at all. *Id.* at 630-31, 636-37.[8]

Each draft of the "Supervisory Action Agreement" or "SAA" that Glendale and the Insurance Corporation ex-

[7] *See also* J.A. 575-77. As the three cases consolidated here illustrate, the government often bargained for amortization schedules different from the maximum permissible period, just as it negotiated other financial terms and often agreed to "capital credits," Pet. App. 5a, some amount of cash assistance, *see id.* at 193a, and other non-cash forms of assistance, *see id.* at 5a-7a.

[8] Glendale's merger agreement with Broward was expressly conditioned upon the government's execution of a "Supervisory Action Agreement" that was "satisfactory in form and substance to Glendale" and did not impose "any conditions to which Glendale has not agreed." J.A. 579. Glendale thus retained the express right to walk away from the merger if it could not reach a final, acceptable agreement with the government.

changed had attached a two-page list of additional matters to cover. *See* C.A. App. 1478-79, 1504-05, 1527-28, 1593-94. *All* these drafts contained the following provision as item number "6" on the list:

> *Glendale's method of accounting* for the transaction as a purchase, *including periods for amortization of goodwill* and discount on loans, *to be approved.*

Id. at 1479, 1505, 1527, 1593 (emphasis added). On November 13, 1981, Glendale submitted to the Bank Board its formal proposal for the merger on the terms earlier agreed in principle, *id.* at 1861-62, which included an opinion letter from Glendale's accountants regarding the proposed use of purchase method accounting and 40-year amortization for goodwill. J.A. 575-77. In response, the government forwarded drafts *it* had prepared of documents addressing various agreed terms, but "[w]ith respect to item 6," concerning the proposed accounting and 40-year amortization, the government requested more detailed information. *Id.* at 581. The next day Glendale provided the requested information. *Id.* at 583-84.

At a meeting held November 19, 1981, the Bank Board ratified the agreement with Glendale.[9] The Insurance Corporation's Director opened the discussion at the meeting

[9] In so doing, the Bank Board considered a detailed package of information about the transaction, C.A. App. 1758-1823. This included (1) final drafts of the SAA, *id.* at 1775, and related Bank Board Resolutions Nos. 81-710, 81-711 and 81-712, *id.* at 1768-73, which expressly required use of purchase method accounting; (2) Glendale's accountants' November 10, 1981 opinion letter, as well as the Insurance Corporation's own summary of the agreed-upon use of purchase method accounting for the merger (including 40-year amortization), *id.* at 1797-98; (3) the Insurance Corporation's calculations showing that, after assuming Broward's excess liabilities, Glendale would continue to satisfy applicable regulatory requirements if the offsetting goodwill were included in Glendale's capital, but would *not* satisfy those requirements if the goodwill were *not* included, *id.* at 1764, 1802; and (4) the Insurance Corporation's financial analyses showing the $783 million cost to liquidate Broward, *id.* at 1802-05; *see also* J.A. 586.

by stating that "[t]he major elements of the *agreement* [include] the use of purchase accounting." J.A. 614 (emphasis added). He then recommended that the Bank Board approve and implement the agreement with Glendale, *id.* at 616, because:

> —"[A]bsent a merger as contemplated, it would be necessary to provide a substantial capital infusion into Broward to avert insolvency and a possible liquidation with a payment to insured savers." C.A. App. 1765.[10]
>
> —"[I]n my judgment, I don't think we'll ever see a *deal* like this one again in terms of its benefit to the FSLIC. . . . It's an incredible opportunity for the FSLIC and the Bank Board to show how a large problem can be resolved with minimal expense and should build a great deal of confidence in the industry." J.A. 615 (emphasis added).

At the conclusion of the November 19 meeting the Bank Board ratified the agreement with Glendale by adopting several resolutions. *Id.* at 605-612. In Resolution No. 81-710, *id.* at 605, which was incorporated by reference into the SAA, *id.* at 598-99, the Bank Board, among other things, (i) authorized the Insurance Corporation to enter into the contract; (ii) required that Glendale "submit a stipulation that any goodwill arising from the transaction shall be determined and amortized in accordance with FHLBB Memorandum R-31b," *id.* at 607, the Bank Board's then-existing statement of requirements for treatment of goodwill as net worth in thrift mergers; (iii) required that Glendale, following the merger, furnish an accountant's letter "satisfactory to the [Bank Board's] Supervisory Agent," i*d.* at 607, confirming Glendale's use of purchase accounting for the merger, which letter was submitted and accepted, and reflected the parties' agreement to amortize nearly all of Glendale's goodwill "over 40 years," *id.* at 624; *see* Pet. App. 21a;

[10] The government had explored other alternative solutions, and approached other potential acquirors, without success. J.A. 614-15.

and (iv) affirmed that the transaction was necessary "to prevent the failure of Broward," J.A. 605. At the meeting, the Bank Board members and staff also specifically addressed and agreed to the 40-year goodwill amortization period. *Id.* at 616.

The Bank Board Chairman closed the meeting by observing that "the solution which FSLIC has found is one which appears to save the people of the United States . . . approximat[ely] three quarters of a billion dollars." *Id.* at 617. Contemporaneously with the issuance of the Bank Board resolutions mentioned above, the Insurance Corporation and Glendale executed the SAA, *id.* at 645, and the merger of Broward into Glendale became effective.

Following the merger, Glendale honored and fully performed all its obligations under the contract with the government (including paying the government $18.24 million pursuant to the contract's interest rate protection terms). *Id.* at 646-47. For the first eight years following the parties' agreement, the government likewise honored its commitments concerning goodwill and its amortization. *Id.*

5. In the late 1980's the government began to rethink its earlier contractual commitments with respect to goodwill (and other intangible assets). H.R. Rep. No. 54(I) at 507-08. In 1989 Congress enacted the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (codified at 12 U.S.C. § 1464, *et seq.* (1994)) ("FIRREA"), which, among other things, required new thrift capital standards disallowing use of "unidentifiable intangible assets"—*i.e.*, goodwill. *See* Pet. App. 203a. FIRREA led the Office of Thrift Supervision ("OTS") to adopt regulations providing that Glendale "must deduct" from its regulatory capital the goodwill acquired in the Broward merger. 12 C.F.R. § 567.9(c) (1990); *see also id.* § 567.5(a)(2). Thus, having used this "indispensable tool" in 1981 to induce Glendale to agree to take on Broward's massive excess liabilities, in 1989 the government changed its mind

and deprived Glendale of the contracted-for consideration. At the same time, the government retained the $783 million benefit of Glendale's performance.

The government's "must deduct" edict required Glendale to deduct from its regulatory capital hundreds of millions of dollars of goodwill the government had promised in the contract and forced Glendale either to replace the lost capital with cash or dramatically reduce its earning assets, or both, to avoid regulatory seizure. *See* Pet. App. 119a-120a. Glendale in fact fell out of regulatory capital compliance for the first time in its history. *Id.* at 14a. After restructuring and divesting billions of dollars of income-producing assets in an effort to return to capital compliance, Glendale came within weeks of seizure and liquidation. *Id.*

In its brief, the government dryly notes that Glendale "raised the necessary new capital" and "has remained an operating thrift." Pet. Br. 7. In fact, Glendale narrowly avoided seizure (and saved the government's insurance fund from large losses a *second* time) only by completing a complex $668 million recapitalization—the largest *entirely private* recapitalization of a troubled financial institution in United States history. Glendale today is a "well-capitalized" institution, as it was in 1981 and at all times prior to FIRREA. The government thus neatly transferred its own massive insurance liabilities arising from Broward's insolvency to Glendale, saving itself more than three-quarters of a billion dollars and causing severe harm to Glendale's operations and earnings.

6. In 1990, Glendale filed suit against the United States in the Court of Federal Claims, seeking monetary relief under various contract and constitutional claims. The court granted Glendale's motion for partial summary judgment on contract liability, based on the language of Glendale's contract and the uncontroverted facts and affi-

davits.[11] The court then consolidated Glendale's case with the *Winstar* and *Statesman* cases for purposes of interlocutory appeal. Pet. App. 151a-152a.

A split panel of the Federal Circuit, over the dissent of Judge Newman, *id.* at 89a-103a, initially reversed the Court of Federal Claims' decision. The full court, however, ordered the panel decision vacated and withdrawn when it agreed to rehear the case *en banc*. *Id.* at 105a. The *en banc* Federal Circuit then affirmed the trial court's breach of contract rulings by a 9-2 vote. After *"de novo"* review of the contract documents, *id.* at 17a, the *en banc* court specifically "agree[d]" with the trial court that the government had stated *"in the clearest possible terms," id.* at 17a, 36a, an "express contractual obligation" to permit Glendale to count the goodwill generated in the Broward merger "as a capital asset for regulatory capital purposes" and "to amortize the major portion of that goodwill . . . for a period of 40 years." *Id.* at 17a. The Federal Circuit also found the parties' clear contractual intent confirmed by their conduct and the circumstances surrounding the transaction, including the "extensive negotiations and . . . conditions" regarding the use of goodwill, *id.* at 22a, and the fact that, if the offsetting $734 million of goodwill had not counted as a capital asset, Glendale—a "healthy, fully capitalized thrift" *before* the Broward merger—would have had a net worth immediately *following* the merger of *negative* $460 million. *Id.* at 22a n.5.[12]

The Federal Circuit also agreed there was "little question that the application of FIRREA and the regulations

---

[11] The court held, among other things, that "an express contract existed," Pet. App. 122a, which "called for the use of the purchase method of accounting and the amortization of an intangible supervisory goodwill asset over . . . forty years," *id.* at 119a.

[12] As the *en banc* Federal Circuit noted, absent the government's contractual goodwill commitments, Glendale "would have been subject to regulatory noncompliance and penalties from the moment" it merged with Broward, a transaction "no healthy thrift would consummate." Pet. App. 22a.

thereunder to deny or restrict [Glendale's] contractual rights to use supervisory goodwill with the associated amortization periods . . . was a breach of the FSLIC's and the Bank Board's agreement[]" with Glendale. *Id.* at 29a. The Federal Circuit rejected the government's contracting authority and "sovereign acts" arguments, adopting the substance of the Court of Federal Claims' analysis of these issues. *Id.* at 31a.[13]

SUMMARY OF ARGUMENT

I. The government's first argument is that Glendale's contract with the Insurance Corporation was not "unmistakably" clear in providing Glendale with a right to use goodwill amortized over 40 years and thus, because the contract would affect the government's regulatory prerogatives, Glendale's contract right is unenforceable. The argument is wrong both legally and factually.

As a matter of law, the unmistakability principle does not apply at all to damages claims to enforce rights in financial contracts entered into by the government. Glendale's contract is plainly a financial contract; Glendale assumed $734 million of the government's own liabilities as an insurer.

Most important, as both courts below held, Glendale's contract "granted [Glendale], *in the clearest possible terms*, the right to certain types of regulatory capital treatment." Pet. App. 36a (emphasis added); *id.* at 142a-143a. Glendale's contract thus meets the test of unmistakability.

[13] In dissent, Judge Lourie agreed with the *en banc* majority that Glendale has the contract rights it claims and that the government abrogated those rights following FIRREA. Pet. App. 49a. He nevertheless argued that sovereign acts principles precluded Glendale's recovery for breach of contract. *Id.*

The other dissenter, Judge Nies, also found that Glendale and the government had agreed on the use of purchase method accounting but concluded that, to create enforceable rights that survived legislative change the contract had to have a second explicit promise by FSLIC "to pay [damages] if Congress decided to step in and do away with . . . 'purchase method . . . accounting.'" *Id.* at 48a.

The government insists that the contract must contain unspecified magic words to satisfy "unmistakability," but that is not the law. The unmistakability principle is designed to effectuate the government's purpose, not to frustrate that purpose. Thus, the test is whether the government's intent to make a contractual commitment "satisfactorily appears" from the terms used by the parties and the surrounding circumstances, particularly when as here the sole dispute is the "scope" of a government contract, not whether a contract exists at all. *E.g.*, *Russell v. Sebastian*, 233 U.S. 195, 204-05 (1914).

Here, the government's contractual intent is clear, unmistakable, and uncontroverted. As demonstrated *infra*, at pp. 20-22, the bargained-for, express provisions of Glendale's contract with the Insurance Corporation ineluctably lead to the term that "[p]ursuant to the provisions of . . . the Supervisory Action Agreement" not only does Glendale have a contractual right to use Goodwill as capital, but also "$18,000,000 of the resultant goodwill . . . will be amortized on a straight line basis over 12 years" and the "remaining goodwill of $716,666,000 will be amortized on a straight line basis over 40 years." J.A. 623-24. This provision therefore constitutes an enforceable term of Glendale's contract.

The government's alternative argument under the rubric of unmistakability is that to be binding, a government contract needs a second promise that Congress would not enact "new regulatory legislation." Pet. Br. 22. This theory is contrary to a host of precedents from this Court including *Perry v. United States*, 294 U.S. 330 (1935), and *Lynch v. United States*, 292 U.S. 571 (1934), where the binding contracts contained no "second" promises. Moreover, Glendale's contract contains express provisions that more clearly allocate to the gov-

ernment the financial risk of a statutory change than any contractual provision in *Perry* or *Lynch*.

The plain meaning of the Glendale contract is further supported by precedent that this Court will not interpret federal contracts, or use the unmistakability principle, to produce a financially irrational transaction for the private party. *E.g., United States v. Purcell Envelope Co.*, 249 U.S. 313, 322 (1919); *The Binghamton Bridge*, 70 U.S. (3 Wall.) 51, 78 (1865). It would have been irrational in 1981 for a healthy, solvent Glendale, which had $277 million of its own existing net worth at stake, to agree to assume $734 million of excess thrift liabilities without the binding protection provided by the government's contractual goodwill commitments.

Indeed, it is *uncontroverted that* "[h]ad the government not *agreed*" to its goodwill commitments, "Glendale would not and could not have entered into the transaction." J.A. 645 (emphasis added). It is further uncontroverted that the Insurance Corporation "agreed that Glendale would use the purchase method to account for the transaction; that the $734,660,000 in resulting goodwill could be used as an asset for regulatory capital purposes . . . and that most of the goodwill would be amortized over forty years." *Id.* Under the rules applicable to Court of Federal Claims cases, *see infra* A3-A4, the courts will "deem . . . established" these uncontroverted *dispositive* facts. R.C.F.C. 56(d)(3) (1992).

II. The government's arguments that the Insurance Corporation lacked authority to contract to recognize Glendale's goodwill are contrary to this Court's precedents. First, "the power [of a government] to enter into effective financial contracts cannot be questioned." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 24 (1977). Second, outside the uniquely important areas of the public health and the public morals, the government may make contracts, fully enforceable in damages, that touch upon regulatory matters, notwithstanding the government's later self-serving invocation of the "police power." *E.g., Perry*,

294 U.S. at 343, 348-50, 353. Third, the Insurance Corporation's specific statutory authority under 12 U.S.C. § 1729(f)(2) (Supp. V 1982) "to guarantee [the acquiring institution] against loss," as well as the Insurance Corporation's comprehensive statutory authority under 12 U.S.C. § 1725(c)(3) (1976) "[t]o make contracts," amply authorized the Insurance Corporation's contract with Glendale under the test applicable to federal agency contracts. *See, e.g., Lynch*, 292 U.S. at 577-78; *Jessup v. United States*, 106 U.S. 147, 152 (1882).

III. The government's "sovereign acts doctrine" argument also is unfounded and contrary to this Court's precedent. *Perry* and *Lynch* both reject using the fact that a statute applies to more than government contracts as a basis for relieving the government of its contractual liability for damages. Indeed, the impact of the statutory provisions here is far more focused on government contracts, and thus less "general," than the statutes at issue in *Perry* and *Lynch*. Moreover, the government improperly seeks to give FIRREA's goodwill provisions a retroactive effect—to bar damages on pre-existing contracts—even though the government concedes that Congress has not spoken at all, much less "clearly spoken," to that issue. *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1507 (1994).

ARGUMENT

The three issues raised by the government are versions of issues commonly found in contract cases: (1) Did the government's contractual obligations include a commitment that Glendale could use goodwill as capital amortized over 40 years, in lieu of cash assistance, to offset Broward's excess liabilities and make the merger financially feasible? (2) Did the Insurance Corporation have authority to incur this contractual obligation? (3) Is the United States liable in damages for its failure to perform its contractual obligation? Clear precedent from this Court requires an affirmative answer to each question.

I. THE GOVERNMENT'S CONTRACT CLEARLY RECOGNIZED GLENDALE'S RIGHT TO USE GOODWILL FOR CAPITAL IN ACCORDANCE WITH GAAP.

The government's case rests principally on three flawed propositions. First, the government contends that Glendale's contract to assume the Insurance Corporation's financial liabilities should not be treated as an ordinary contract. Pet. Br. 17-19. Second, notwithstanding overwhelming *and undisputed* evidence to the contrary, the government contends that it did not express in unmistakable terms an intent to permit Glendale to use goodwill as capital to be amortized over a 40-year period. *Id.* at 22-28. Third, the government contends that if such a promise concerning goodwill were made, Glendale still has no contractual rights because "unmistakability" requires a second promise that Congress would not enact "new regulatory legislation." *Id.* at 22. The first proposition ignores long-standing precedents of this Court which recognize that the government's financial contracts should be enforced pursuant to ordinary contract law principles. *See infra*, pp. 16-18. The second proposition is belied by: (1) the express terms of the agreement; (2) settled case law that the government's contractual obligation must be interpreted not to be a gross mismatch against the value of the consideration that the government received in the agreement; and (3) *uncontroverted* facts concerning the government's contractual intent. All of these (singly and in combination) make the government's contractual intent clear and manifest. *See infra*, pp. 18-24, 29-34. The third proposition is contrary to settled law—particularly *Perry* and *Lynch*—and also ignores express provisions in Glendale's contract. *See infra*, pp. 26-28.

1. *The Financial Contract Here Does Not Infringe The Government's Sovereign Authority, And Therefore The Unmistakability Principle Does Not Apply.* Although, as both courts found below, the standard of unmistakability is easily satisfied in this case, the government's

attempted use of this standard is misplaced, because paying damages for breaching the financial contract at issue does not infringe the government's sovereign authority in the first place. Both its context and its terms demonstrate that the agreement between the Insurance Corporation and Glendale was a financial contract, whereby Glendale agreed to assume net liabilities of $734 million from the government, as insurer of Broward's deposits, in return for the essential consideration provided by the government through its agreement to recognize "goodwill . . . amortized . . . over 40 years," which both parties understood to be a substitute for a cash infusion. J.A. 577, 584, 616-17.

Glendale does not contend that the Insurance Corporation "bargained away Congress's right to change the law." Pet. 14. Rather, Glendale seeks only compensation for the government's breach of its contractual obligation to provide equivalent value for the benefit the Insurance Corporation received from Glendale's assumption of the Corporation's insurance liabilities. Providing compensation for the government's failure to fulfill its financial contract does not require the government to "surrender[] an essential attribute of its sovereignty." *United States Trust Co.*, 431 U.S. at 23; *see New Orleans Gas Light Co. v. Louisiana Light & Heat Prod. & Mfg. Co.*, 115 U.S. 650, 672-73 (1885) (payment of damages for repudiating grant of monopoly to public utility does not infringe sovereign authority).

Far from infringing sovereign authority, making enforceable contracts designed to assist the government financially is the very essence of sovereign authority. *Perry*, 294 U.S. at 353. Thus, this Court has stated that "[w]hatever the propriety of a State's binding itself to a future course of conduct in other contexts, *the power to enter into effective financial contracts cannot be questioned.*" *United States Trust*, 431 U.S. at 24 (emphasis added). Indeed, the government concedes that "purely financial contractual obligations" of the government are

not subject to the unmistakability principle. Pet. Br. 20 n.9, 41-42.

Glendale's point is not that the unmistakability principle has no application to *any* claim for breach-of-contract damages. Rather, the principle does not apply to a damages claim for the government's breach of a contract entered into *for its own financial benefit*. Glendale's contract is precisely that. Ordinary rules of contract interpretation therefore apply.

2. *Even If Unmistakability Applies, It Is Satisfied In This Case, As Both Courts Below Found.* Of course, this Court need not even decide whether the unmistakability principle applies in this case, because, as both courts below held, the evidence overwhelmingly demonstrates the government's unmistakable intent to permit, indeed require, Glendale to use goodwill as capital to be amortized over 40 years. Contrary to the government's arguments, Pet. Br. 20-22, neither court below refused to apply unmistakability principles. The Court of Federal Claims found that "there has been little serious dispute that the government granted the acquiring thrifts, *in the clearest possible terms*, the right to certain types of regulatory capital treatment." Pet. App. 142a-143a (emphasis added). The Federal Circuit concurred, stating "[i]t is *clear* from the documents that this was the intent of the parties." *Id.* at 22a (emphasis added). As demonstrated herein, the scope of the government's contractual commitment regarding goodwill is clear from the terms adopted as part of the government's agreement, the value of the consideration the government accepted from Glendale, and the *undisputed* facts and evidence in this case.

a. *Unmistakability Addresses Intent, Not Formality.* The unmistakability principle simply requires a showing of the government's clear contractual intent. *See, e.g., Binghamton Bridge*, 70 U.S. (3 Wall.) at 74 ("All contracts are to be construed to accomplish the intention of the parties."). There are no specific words or forms that must be used. Rather, unmistakability "does not deny to public [contracts] a fair and reasonable interpretation" and is satisfied whenever the government's contractual intent "satisfactorily appears" from the terms of the parties' agreement and the surrounding circumstances. *Russell v. Sebastian*, 233 U.S. 195, 205 (1914). This Court has scorned use of the unmistakability principle to create a "narrow and technical" construction of a contract that "would defeat the very end the [government] had in view." *Binghamton Bridge*, 70 U.S. (3 Wall.) at 78; *see* Restatement (Second) of Contracts § 202(1) (1981) ("[w]ords and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight").

Any interpretation of the judge-made unmistakability principle also must be consistent with Congress's direction in the Tucker Act that the United States may be liable "upon any express *or implied* contract." 28 U.S.C. § 1491 (1994) (emphasis added). This statutory recognition of "implied" contracts precludes the government's effort to use unmistakability to require specific words or forms. Rather, as the Contract Clause precedent makes clear, "an implied contract" with the government can satisfy the unmistakability requirement of clear intent. *Mississippi ex rel. Robertson v. Miller*, 276 U.S. 174, 178-79 (1928).[14]

b. *Unmistakability Is More Easily Satisfied When A Contract Clearly Exists And The Only Question Is Its Scope.* A "narrow and technical" construction of the parties' undertakings would be particularly unwarranted in

[14] *See also Columbia Ry., Gas & Elec. Co. v. South Carolina*, 261 U.S. 236, 250 (1923) (unmistakability satisfied by "clear *implication*" or by "*inference* . . . which naturally flows" from the contract as a whole) (emphasis added). The government's cases are not to the contrary. *See, e.g., Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514, 560 (1830) ("[n]o words" in bank charter showing "a promise, either express *or implied*, not to tax the bank") (emphasis added). For a thorough discussion of how Contract Clause precedent refutes the government's arguments on each of the three questions presented, see Brief for *Amicus Curiae* American Association of State Colleges and Universities, *et al.*

this case because the issue here is not the existence of a contract between the Insurance Corporation and Glendale, which the government does not deny, *see* Pet. Br. 14, but rather the scope of the government's obligation under that contract. As this Court held in *Russell*: "When . . . the question simply is with respect to the scope of the [government's] obligation, we should be slow to conclude that only a revocable license was intended." 233 U.S. at 204. Indeed, this Court has emphasized that questions of federal contract *scope* are "determined by the application of the same principles as if the contract were between individuals." *Reading Steel Casting Co. v. United States*, 268 U.S. 186, 188 (1925).[15]

3. *The Government's Clear Intent Is Evident From The Terms Of The Agreement, The Value Of The Consideration Provided By Glendale, And The Undisputed Facts.* The evidence of the government's contractual agreement to recognize Glendale's goodwill amortized over 40 years is overwhelming. The scope of the government's contractual intent is clear not only from the language of the contract itself, but also from the extraordinary value of the consideration that the government accepted from Glendale, and from the *uncontroverted* (indeed, "established," *see, infra*, pp. 32-34) facts.

a. *The Contract Language Establishes The Government's Clear Intent.* In order to deny that its intent was unmistakably expressed in the terms of the agreement, the government purports to carve out of the SAA the very documents that form part of the contract by reference and that describe the goodwill consideration that the Insurance Corporation provided to Glendale. These are Bank Board Resolution 81-710, the Peat, Marwick, Mitchell & Co. letter required by that Resolution, which was specifically approved by the Bank Board, and Bank Board

[15] *Accord Priebe & Sons v. United States*, 332 U.S. 407, 411 (1947); *United States v. Standard Rice Co.*, 323 U.S. 106, 111 (1944); *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 298 (1942); *Perry*, 294 U.S. at 352; *Lynch*, 292 U.S. at 579; *Hollerbach v. United States*, 233 U.S. 165, 171-72 (1914).

Memorandum R 31b. *See* Pet. Br. 15, 24. The government's construction of the agreement defies both common sense and basic rules of contract interpretation.

The critical terms clearly expressed in the Insurance Corporation's agreement with Glendale provide that: (1) Glendale had the right to treat goodwill as capital to offset Broward's substantial excess liabilities of $734 million, and (2) Glendale could amortize approximately $716 million of this asset over 40 years, and the remaining $18 million over 12 years. Those terms are contained in documents that were included in the contract through the integration clause of the SAA, which provides:

> This Agreement . . . constitutes the entire agreement between the parties thereto and supersedes all prior agreements and understandings of the parties in connection herewith, *excepting only* the Agreement of Merger and any resolutions or letters issued contemporaneously herewith.

J.A. 598-99 (emphasis added). The government ignores that the plain meaning of the integration clause is to describe those "agreements and understandings of the parties in connection herewith" that are "except[ed]" from being "superseded" by the SAA. *Id.* at 599. By the express terms of the integration clause, the contemporaneous Bank Board "resolutions [and] letters" are precisely such "except[ed]" "agreements and understandings."

It is a well established rule of contract interpretation that "[w]here a writing refers to another document, that other document, or so much of it as is referred to, is to be interpreted as part of the writing." 4 S. Williston, *A Treatise on the Law of Contracts* § 628, at 901 (3d ed. 1961). This Court has not hesitated to find the government's intent unmistakably expressed where the relevant language comes from documents referred to in the principal text memorializing a contractual agreement. *See, e.g., Humphrey v. Pegues*, 83 U.S. (16 Wall.) 244, 248 (1872) (contract referred to charter of another railroad); *Binghamton Bridge*, 70 U.S. (3 Wall.) at 78-79.

Accordingly, it is an uncontroverted fact, *see* J.A. 641, that the SAA expressly includes Bank Board Resolution 81-710, which approved the SAA, in the terms of the agreement. In turn, that incorporated Resolution refers to two other documents that form part of the agreement. *First*, the Resolution provides that Glendale "shall furnish," as a condition for Bank Board approval of the transaction, an opinion from Glendale's independent accountant (Peat, Marwick) that would: (1) "specifically describe[] . . . any goodwill . . . to be recorded on Glendale's books," and (2) "substantiat[e] the reasonableness of the amounts attributed to goodwill . . . and the resulting amortization periods," based on guidelines set forth in Bank Board Memorandum R 31b. *Id.* at 607. The Resolution required that the accountant's opinion be approved as "satisfactory to the [Bank Board] Supervisory Agent." *Id.* It is undisputed that the Peat, Marwick opinion letter was submitted and was "satisfactory to the Bank Board's supervisory agent as required by the Resolution." Pet. App. 21a. In sum, the Resolution (which is expressly incorporated into the SAA) both referred to and necessarily included the Peat, Marwick opinion letter and the government's acceptance of that letter as part of the agreement of the parties.

The Peat, Marwick letter provides that "[*p*]*ursuant to the provisions of . . . the Supervisory Action Agreement* between [Glendale] and the Federal Savings and Loan Insurance Corporation . . . [Glendale has] accounted for the acquisition using the 'Purchase Method' of accounting." J.A. 623 (emphasis added). This meant that pursuant to the SAA, "$18,000,000 of the resultant goodwill . . . will be amortized on a straight line basis over 12 years" and the "remaining goodwill of $716,666,000 will be amortized on a straight line basis over 40 years." *Id.* at 624.

Second, the Resolution further required Glendale to submit "a *stipulation* that any goodwill arising from this transaction *shall be determined and amortized in accordance with* [Bank Board] Memorandum R 31b." *Id.* at

607 (emphasis added). The plain meaning of "stipulation" is "[a] material condition, requirement, or article *in an agreement.*" *Black's Law Dictionary* 1269 (5th ed. 1979) (emphasis added); *see also The American Heritage Dictionary* 1267 (1976) ("a term or condition in an agreement"). It is thus difficult to imagine a clearer contractual provision that Memorandum R 31b would, as a matter of "stipulation" (*i.e.*, agreement), govern the present and future treatment of goodwill under the Resolution and thus by reference under the SAA. As adopted into the contract, Memorandum R 31b unmistakably required Glendale to use the "purchase method of accounting" under GAAP such that goodwill would be treated as an "asset" subject to "amortization" *for purposes of meeting a thrift's net worth requirements.* J.A. 571, 573.[16] As was explained and agreed by Bank Board officials at the meeting where the Insurance Corporation agreed to enter the Glendale transaction, this meant that Glendale would amortize most of its goodwill over "40 years." *Id.* at 616.

Because Glendale's contract adopted Memorandum R 31b, its requirements, as *then in force*, became a fixed term of the contract that could not be affected by subsequent changes in regulation or government policy. *Craft Machine Works, Inc. v. United States*, 926 F.2d 1110, 1115 (Fed. Cir. 1991) ("The meaning of this contract, however, cannot change because the Government changed its interpretation of the law."); *see also Hughes Communications Galaxy, Inc. v. United States*, 998 F.2d 953, 957-58 (Fed. Cir. 1993) (when there is clause "identifying and incorporating an existing, specific and dated item of presidential policy," this "more than satisfies the 'un-

[16] At that time, it was well understood that Memorandum R 31b addressed purchase method accounting and the use of resulting goodwill as an asset for purposes of meeting "net worth" (*i.e.*, capital adequacy) requirements. 47 Fed. Reg. 8152 (Feb. 25, 1982). The term "regulatory capital" was not introduced until 1986. 51 Fed. Reg. 16,550 (May 5, 1986). *See also* 12 C.F.R. § 563.13 (1981) (referring to thrift capital only as "net worth," the same term used for accounting purposes under GAAP).

mistakable terms' requirement"); *Cramp Shipbuilding Corp. v. United States*, 122 Ct. Cl. 72, 97 (1952) ("a contract can hardly mean one thing today and another tomorrow"); *see also Wood v. Lovett*, 313 U.S. 362, 369-70 (1941) (deed from state conveyed under statute protecting title unaffected by repeal of statute); *Lynch*, 292 U.S. at 577 ("The terms of these contracts are to be found . . . in part in the statutes *under which they are issued and the regulations promulgated thereunder.*") (emphasis added); *Von Hoffman v. City of Quincy*, 71 U.S. (4 Wall.) 535, 550 (1867) (dictum) (terms of contract clearly include current laws that "were expressly referred to *or* incorporated") (emphasis added). No subsequent change in regulation or government policy could change the meaning of Glendale's contract.

b. *The Contract Does Not Authorize The Government To Impose Contrary Goodwill Accounting Requirements.* The government also relies, Pet. Br. 28, upon the provision in the contract that "unlawful action" is not required. The government asserts that this somehow reserved to it the unilateral right by changing the law to alter or revoke the terms of its contractual obligations concerning goodwill. The courts below correctly concluded that this provision was simply designed to ensure compliance with the law in existence at the time the contract was entered. *See* Pet. App. 23a-24a, 125a-132a. Indeed, the government conceded in the Court of Federal Claims that the "unlawful action" provision "makes no reference to the effect of any changes in the applicable laws." C.A. App. 2222 n.16; *see also id.* at 2212 (similar concession).

In arguing now that "unlawful action" has a far broader meaning, the government ignores contract provisions that directly address the parties' ability to change their contract obligations. First, Resolution 81-710, as incorporated into the contract, requires that Glendale's goodwill "shall be determined and amortized in accordance with" *then-existing* Bank Board Memorandum R 31b. J.A. 607. Second, the SAA also provides that "[n]o . . . modification . . . of this Agreement shall be binding unless set

forth in writing and *executed by all the parties* or their proper successors." *Id.* at 600 (emphasis added). Third, the contract provides that "[t]he rights, powers, and remedies given to the parties by this Agreement *shall be in addition to* the rights, powers and remedies given by any applicable statute or rule of law." *Id.* at 599 (emphasis added). These provisions rebut any notion that Glendale's contractual rights were subject to unilateral alteration or revocation by the government, or that Glendale's contractual rights to compensation for breach of contract could be defeated by the subsequent promulgation of "any applicable statute or rule of law."

Moreover, even assuming *arguendo* that "unlawful action" refers to future laws, Glendale has never sought to use its contractual rights to compel "unlawful action." This Court has held that when the law changes after a contract is made, there is nothing "unlawful" about paying damages for breach of the contract—which is what Glendale seeks—"even when specific performance of the contract would violate public policy." *W.R. Grace Co. v. Rubber Workers*, 461 U.S. 757, 768-70 & n.13 (1983); *accord Missouri, K. & T. Ry. v. Oklahoma*, 271 U.S. 303, 310 (1926) (government contract).

Finally, when the government undertakes a contractual obligation, even if the government generally reserves the right to change the law (which the SAA did *not* do), Pet. App. 129a-130a, such a provision will not be interpreted to allow the government, after the private party has performed, as Glendale has, to excuse itself from paying damages by making its own performance illegal or impossible. *See Lynch*, 292 U.S. at 277-78 (even though war risk policy was "subject to" current and future laws and regulations, government could not abrogate "vested" rights by changing the law); *Detroit v. Detroit Citizens' St. Ry.*, 184 U.S. 368, 378, 384-85 (1902) (city council's reserved right to make "rules, orders, or regulations" as necessary did not include right to alter an "important and fundamental" term, such as agreed-upon rate for

railroad's fare). In particular, here, the more specific provision of the agreement adopting the existing Memorandum R 31b to govern Glendale's use of goodwill prevails over any implication contained in the generalized "unlawful action" provision.[17] Accordingly, there is no basis for the government's suggestion that it inherently reserved the right to repudiate its contractual obligations simply by making them unlawful in the future.[18]

c. *Unmistakability Requires Only One Contract Promise, Not Two.* The government also argues that the unmistakability principle requires more than the government's clear intent to recognize Glendale's use of goodwill amortized over 40 years. Pet. Br. 22. The government thus contends that unmistakability requires a second promise that Congress would not enact "new regulatory legislation." *Id.* This is clearly contrary to precedent. In particular, *Perry v. United States*, in an opinion for the Court by Chief Justice Hughes, and *Lynch v. United States*, in a unanimous opinion by Justice Brandeis, rejected arguments that Congress's sovereign powers

[17] *See, e.g., Hughes Communications*, 998 F.2d at 957-58 (provision with specific reference to executive directive prevails over general clause which "subordinates the contract only to unspecified . . . law and . . . policy"); *Hills Materials Co. v. Rice*, 982 F.2d 514, 516-17 (Fed. Cir. 1992) (same).

[18] The government's additional suggestion, Pet. Br. 23 n.14, that it was not bound after 1991 to recognize Glendale's use of goodwill because certain terms of the contract have expired, is specious. Indeed, the government conceded in the Court of Federal Claims that this expiration provision, *see* J.A. 598, was limited to the contract provisions concerning potential government interest rate and indemnification payments. C.A. App. 2221, 2231-32, 2371. In contrast, Glendale's right to use and amortize goodwill "in accordance with" Memorandum R 31b, *see* J.A. 607, was fixed when the contract was executed. *See, e.g., Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137 (1810) ("A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right.").

allowed it to abrogate contracts previously entered on behalf of the United States. *See Perry*, 294 U.S. at 349-54; *Lynch*, 292 U.S. at 579-80. Neither the "gold clause" contractual provisions in *Perry* nor the war risk insurance contracts in *Lynch* contained any "second promise" that Congress would not enact "new regulatory legislation," Pet. Br. 22. *See Perry*, 294 U.S. at 347-48; *Lynch*, 292 U.S. at 577-78. Indeed, both cases reject any requirement of a "second promise" as unnecessary and contrary to common practice and understanding. *Perry* in particular holds that " '[i]t is in theory impossible to reconcile the idea of a promise which obliges, with a power to make a law which can vary the effect of it.' ". 294 U.S. at 351 n.2 (quoting Alexander Hamilton, 3 *Hamilton's Works* 518, 519 (communication to Senate, 1795); *cf. Standard Rice Co.*, 323 U.S. at 110 (subsequent change in law did not provide basis for granting government relief from its contractual obligations because "[t]here is no such provision in the present contract"). Nor can *Lynch* and *Perry* be distinguished, as the government argues, as not involving Congress's regulatory powers or as involving "purely financial contractual obligations." Pet. Br. 41. *Perry* held that honoring the contractual "gold clause" provisions meant that "the power of Congress to *regulate* the value of money; that is, to establish a monetary system and thus to determine the currency of the country" could not be used as a basis for Congress to "disregard the obligations of the government." 294 U.S. at 350 (emphasis added). And *Lynch* acknowledged that the war risk insurance policies were "not entered into by the United States for a business purpose." 292 U.S. at 576.[19] Glendale's contract is at least as "purely financial" as the contracts in *Lynch* and *Perry*.

[19] *See also* United States' Supplemental Brief at 2, *Lynch* (No. 33-855) ("whatever was done by Congress to pay, support, or improve the morale of its soldiers in war time was done as a sovereign and not as a business").

Contract Clause precedent, from which the "unmistakability" principle arose, also rejects any requirement that a government contract make a "second promise" that the legislature will not abrogate the contract. In particular, this Court repeatedly has rejected a variety of government attempts to use the unmistakability principle to interpret contractual obligations as being subject to an implicit unilateral right of the government to change those contractual obligations by changing the law. *See Russell v. Sebastian*, 233 U.S. 195, 204 (1914) ("When the voice of the state declares that it is bound if its offer is accepted . . . we should be slow to conclude that only a revocable license was intended."); *Powers v. Detroit, G.H. & M. Ry.*, 201 U.S. 543, 559 (1906); *St. Anna's Asylum v. New Orleans*, 105 U.S. 362, 369 (1882) ("addition of a declaration, that the [tax] exemption given should not be withdrawn, would not have added to its force").[20]

The government also ignores that Glendale's contract did contain express provisions that Glendale's contractual rights (i) could not be unilaterally altered by the government (but only by written consent of both parties), and (ii) "*shall be in addition to* all rights . . . given by any applicable statute or rule of law." J.A. 599 (emphasis added). These contract provisions constitute a far clearer "second promise" indicating that the Insurance Corporation assumed the risk of compensating Glendale for a

[20] *Accord Detroit Citizens' St. Ry.*, 184 U.S. at 384 ("It would hardly be credible" that contractor would agree that a critical term "should be subject to change from time to time by the sole decision of the" government); *Murray v. Charleston*, 96 U.S. 432, 445 (1877) ("A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity."); *New Jersey v. Yard*, 95 U.S. 104, 116-17 (1877) (principle that "the contract must be clear, and cannot be made out by dubious implications" does not support "[t]he implication . . . of a right to revoke" by the government); *see also United States v. Purcell Envelope Co.*, 249 U.S. 313, 318-19 (1919) (federal contract: there "must be some point at which discretion ceases and obligation takes its place").

statutory change that impaired contractual rights than any provision in *Perry*, *Lynch*, or the Contract Clause cases.

Equally unavailing is the government's suggestion that a "second promise" was required because goodwill regulations were in a state of change when Glendale entered into its contract in 1981. Pet. Br. 3-4 n.1, 27. First, that assertion is factually wrong.[21] Second, Glendale's contract required goodwill accounting "in accordance with" the *existing* Memorandum R 31b. *See supra, pp.* 23-24. Third, even if it had its facts straight, the government has the law backwards. That an event is foreseeable is "a factor that suggests that the *promisor* assumed the risk of its occurrence." 2 E. Farnsworth, *Farnsworth on Contracts* § 9.6, at 555-56 (1990); *see Standard Rice Co.*, 323 U.S. 106, 110 (1944). Most clearly, a party bears the risk that its own actions will prevent specific performance of the contract. *See W.R. Grace Co.*, 461 U.S. at 767 n.10. Here, the government has prevented its own specific performance of its contractual obligations.[22]

d. *The Value Of The Consideration Provided By Glendale Demonstrates The Government's Clear Contrac-*

[21] The Bank Board *proposal* that the government cites, Pet. Br. 3-4 n.1, stated merely that "[i]nstead of treating goodwill . . . on a case-by-case basis to determine capital adequacy, the Board has decided to propose benchmarks for the amount of goodwill that may be counted in calculating net worth of the resulting institution." 45 Fed. Reg. 72,681-72,682 (Nov. 3, 1980). Moreover, the government neglects to inform the Court that the proposal was *withdrawn* several months later because the Bank Board determined "that imposition of this new limitation could discourage potential merger partners from consummating necessary mergers." 46 Fed. Reg. 42,274 (Aug. 20, 1981).

[22] Under the Contract Clause cases, the government bears the risk that its own change in regulatory policy will prevent it from performing its own contracts. *See, e.g., Russell*, 233 U.S. at 206; *Detroit Citizens St. Ry. Co.*, 184 U.S. at 384-85; *New Orleans Gas Light Co. v. Louisiana Light & Heat Prod. & Mfg. Co.*, 115 U.S. 650, 672-73 (1885).

tual Intent. In suggesting that the government's contractual recognition of Glendale's right to use goodwill as capital was nothing more than a license revocable at will, the government offers an interpretation that is financially nonsensical in light of the value of the consideration that the Insurance Corporation received from Glendale. The detriment Glendale incurred demonstrates that it would have been "madness" to accept in this bargained-for contract the uncertain and disproportionate terms described in the government's belated interpretation. *Binghamton Bridge*, 70 U.S. (3 Wall.) at 78.

This Court has frequently held that it will not interpret the government's contractual obligation to be a gross mismatch financially with the consideration provided by the other party to the contract. In *Purcell Envelope Co.*, for example, this Court held that it would not interpret a federal contract that imposes substantial costs on the contractor to create "but scant obligation upon the part of the government." 249 U.S. at 322. Similarly, with respect to state and municipal contracts, in *Appleby v. Delaney*, 271 U.S. 403 (1926), the Court held that it was not "reasonable to suppose" that private parties would "leave to the city authorities the absolute right to nullify the chief consideration." *Id.* at 413. And *Russell* declined to interpret a government contract such that the government would invite an undertaking "without any assurance" that the private party's performance "could . . . afford any chance of profit." 233 U.S. at 208.[28]

Here, had Glendale not stepped in, the Insurance Corporation would have had to pay liquidation costs in excess of $783 million, J.A. 644, and it lacked the resources to do that. Because Glendale was itself a solvent, healthy

[28] *Accord Detroit, G.H. & M. Ry.*, 201 U.S. at 557; *Detroit Citizens St. Ry.*, 184 U.S. at 384, 398; *Walla Walla v. Walla Walla Water Co.*, 172 U.S. 1, 17 (1898); *New Orleans Gas Light Co.*, 115 U.S. at 662-64; *Humphrey*, 83 U.S. (16 Wall.) at 249; *Binghamton Bridge*, 70 U.S. (3 Wall.) at 78.

institution, Glendale's intervention was particularly valuable as Glendale put up its entire previous net worth of $277 million to relieve the Insurance Corporation of its payment obligation for Broward's excess liabilities.

Given the enormous benefit that Glendale provided to the Insurance Corporation, it is ridiculous to suggest that Glendale bargained for consideration that could become worthless from one day to the next at the sole discretion of the government. As inducement for Glendale to assume the Insurance Corporation's liability on Broward's deposits, the Insurance Corporation had to provide adequate contractual assurance that Glendale would continue to have sufficient net worth to qualify for continuing deposit insurance, notwithstanding the excess liabilities that Glendale would be taking on. The only ways to do this were either a massive cash infusion from the Insurance Corporation or the contractual recognition of Glendale's right to use goodwill as part of capital and thus offset Broward's $734 million of liabilities. *See supra*, pp. 3-5. The Insurance Corporation's recognition of goodwill was, in short, a cash substitute. J.A. 646.

Without this contractual commitment—*i.e.*, if, *arguendo*, the government's position were correct—Glendale would have been subject to closure the day after the transaction and every day thereafter based on a statutory change or any regulator's unfettered decision to cease recognizing the goodwill and thus to render Glendale insolvent by approximately *$460 million*. *See* Pet. App. 22a n.5. The government's interpretation is as much "madness," *Binghamton Bridge*, 70 U.S. (3 Wall.) at 78, as arguing that if the government had made a cash infusion, it could unilaterally seize that money after full performance by Glendale. That "madness" is not alleviated by the fact that Glendale received certain other benefits under the contract, *see* Pet. Br. 27, because it is uncontroverted that those benefits could not have come close to preventing Glendale's immediate insolvency upon Glendale's assumption of the Insurance Corporation's $734

million of excess liabilities. J.A. 629-30, 636, 645-46. No benefit to Glendale was worth anything unless Glendale was solvent and in business. It is uncontroverted that "[h]ad the government not *agreed*" to recognize goodwill, "Glendale would not and could not have entered into the transaction." *Id.* at 645 (emphasis added).

e. *The Uncontroverted Facts "Establish" The Government's Clear Contractual Intent.* In addition to contractual language and the import drawn from the enormous value of the consideration provided by Glendale, this Court has held that extrinsic circumstances and evidence can be used to establish the government's clear contractual intent. For instance, in *White v. United States,* 241 U.S. 149 (1916), even though a government engineering contract contained "ambiguity" as to its scope, *id.* at 153, this Court found the government's broader intent clear based on the actions of the government's engineer in charge, *id.* at 153-54.[24] It would pervert the unmistakability principle, which is designed to discern the government's intent, to use it instead to ignore *undisputed* evidence of that intent and thus to "defeat the very end the [government] had in view." *Binghamton Bridge*, 70 U.S. (3 Wall.) at 78.[25]

---

[24] *See also Detroit Citizens St. Ry. Co.*, 184 U.S. at 398 (when, as here, government did not assert its "alleged power of alteration" until many years after contractor made "expenditures involving millions of dollars," "[t]his in itself is a strong implication of the want of any such power"); *United States v. Gibbons*, 109 U.S. 200, 203-04 (1883) (although language of contract was "susceptible of two meanings," broader undertaking of government was "sufficiently plain" from the "circumstances attending the transaction"); *Humphrey*, 83 U.S. (16 Wall.) at 248-49 (finding clear intent to grant tax exemption to railroad where without such grant "no sufficient inducements had been found to procure the building of the . . . road").

[25] The government tries to draw from one case, *The Delaware R.R. Tax*, 85 U.S. (18 Wall.) 206 (1873), a rule that unmistakability can be satisfied only by contract "language." Pet. Br. 18. There is no such rule and the government's suggestion is contrary to, among others, the cases cited above, the "implied" contract and other cases cited *supra*, p. 18-19 & n.14, and the Tucker

It is difficult to describe an appellate record that more clearly establishes, with undisputed facts and evidence, the government's unmistakable contractual intent than that presented by Glendale's case. First, pursuant to Court of Federal Claims Rule 56(d)(1), *see infra*, A3-A4, Glendale submitted Proposed Findings Of Uncontroverted Fact. J.A. 643. The government did not contest any of Glendale's Proposed Findings. *See* Pet. App. 16a. Thus, pursuant to Rule 56(d)(3), the facts set forth by Glendale's Proposed Findings are "deem[ed] . . . to be established." R.C.F.C. 56(d)(3). The "established" facts include that the Insurance Corporation "agreed that Glendale would use the purchase method to account for the transaction; that the $734,660,000 in resulting goodwill could be used as an asset for regulatory capital purposes . . . and that most of the goodwill would be amortized over forty years (with a small portion being amortized over 12 years)." J.A. 645. When a party has not contested facts in the trial court, as the summary judgment procedural rules require, the party may not contest them on appeal. *See* 10 C. Wright & A. Miller, *Federal Practice & Procedure* § 2716, at 651-54 (1983 & Supp. 1995) (citing cases).

Moreover, each of the uncontested and "established" facts was supported not only by the express terms of Glendale's contract, but also by detailed affidavits from the principal contract negotiators. J.A. 628-42. The government chose not to submit any counter affidavits from government negotiators. This is not surprising because, in a tape recording of the meeting where the contract was consummated, the Insurance Corporation's director stated that "the use of purchase accounting" was one of "the major elements of the *agreement.*" *Id.* at 614 (emphasis added). Summary judgment is required when, as here, the movant's supporting affidavits on the material

---

Act's recognition of "implied" contracts. *Delaware R.R. Tax* is itself dictum, as the only argument by the private party in that case was that the "words" of a statute created a government contract. 85 U.S. (18 Wall.) at 226.

issues are uncontroverted. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986).[26]

4. *The Decisions On Which The Government Relies Are Inapposite.* The government seeks support from this Court's decisions in *United States v. Cherokee Nation*, 480 U.S. 700 (1987), *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986) ("POSSE"), and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). However, in each of those cases, unlike this case, the party asserting a contract right failed to show *any* evidence of the claimed right, much less evidence sufficient to satisfy the unmistakability principle.

Merrion concerned claims by lessees who extracted oil and gas from Indian tribal lands and sought to enjoin taxation by the tribe. 455 U.S. at 136. This Court rejected that argument, because the right asserted against the tribal government was based solely on "the absence of a reference to the tax in the leases." *Id.* at 147-48. *Merrion* offers the government no support, because Glendale's claim is not based on an "infer[ence] . . . from silence." *Id.* at 148.

In *Cherokee Nation*, the grant to an Indian tribe of riverbed interests contained no expression of intent to relieve the tribe of the government's navigational servitude over the river. 480 U.S. at 707. Indeed, the Court relied heavily on the tribe's concession, in the proceeding in which the tribe received its interest in the riverbed, that " 'nothing in the conveyance . . . conflicts with the power

[26] Even assuming *arguendo* that the government were correct that the Insurance Corporation had no contractually binding obligation under the SAA as to goodwill because some sort of required formal language was not used, *but see supra* pp. 18-19, Glendale would have a claim at least for restitution for the benefits received and accepted by the Insurance Corporation. *See Willard, Sutherland, & Co. v. United States*, 262 U.S. 489, 494 (1923) ("While the contract at its inception was not enforceable, it became valid and binding to the extent that it was performed."); *Horton v. United States*, 57 Ct. Cl. 395, 403 (1922) (restitution when formal requirement for making contract not observed).

of the Government [concerning] navigation.' " *Id.* at 706 (citation omitted).

Finally, *POSSE* offers no help to the government, because unlike the bargained-for contractual commitments that Glendale received from the government in the instant case, the right asserted in *POSSE* was a gratuity contained in a general regulatory program. 477 U.S. at 55. In *POSSE*, states claimed the right to terminate standard-form agreements with the federal government enrolling state employees in the federal Social Security System. *Id.* at 49-51. Although originally the states were permitted to terminate these agreements, an amendment to the Social Security Act eliminated that option. *Id.* at 49. This Court found that the termination clause in the agreements was not "a term over which the State had any bargaining power or for which the State provided independent consideration." *Id.* at 55. The agreements were not independently negotiated contracts. *Id.* Therefore, the form agreements in POSSE contained none of what this case has: individually-bargained and clear contractual language, extraordinary consideration, and the *undisputed* and "established" fact of the government's contractual intent.

* * *

The emotional premise underlying the government's brief is that the government should win because this case involves savings and loans. That premise is fundamentally improper. First, the decision in this case will govern all federal contracts (and, indeed, quite possibly state and municipal contracts as well, *see supra*, pp. 18-20 & n.14). The Court has long recognized that the benefits that accrue to the public from requiring the government to abide by its financial contracts far outweigh any short-term gains from permitting the government to escape a contractual obligation out of financial expediency. *See, e.g., United States v. Gibbons*, 109 U.S. 200, 203-04 (1883) (rejecting argument that government implicitly reserved a right to modify obligation, thus placing the "whole risk of the contingency" on the contractor, because the contractor

would have demanded a higher price); *accord Purcell Envelope Co.*, 249 U.S. at 318; *Russell*, 233 U.S. at 206. As *Lynch* held, 292 U.S. at 580: "Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors."[27]

Moreover, two terms ago, this Court refused to craft a special regime of tort law to accommodate the government's current agenda in dealing with the savings and loan crisis. *See O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048, 2055 (1994) (there is "no federal policy that the fund should always win"). Similarly, in this case, there is every reason for the Court to decline the government's invitation to invent a regime of contract law that is contrary to precedent, unfair to private parties, and unwise for the government.

II. THE INSURANCE CORPORATION HAD AMPLE EXPRESS STATUTORY AUTHORITY TO ENTER INTO GLENDALE'S CONTRACT.

The government's next fall-back position is that the Insurance Corporation's clear and unmistakable contract promises to Glendale concerning goodwill accounting are "invalid and unenforceable because the thrift regulators who . . . made them would not have had the authority to bind future Congresses." Pet. Br. 12. As demonstrated herein, under the government's broad "reserved powers" argument, no government could ever make a binding contract commitment on any subject. The government also misreads applicable contracting authority precedent and asks the Court to ignore the express statu-

[27] In view of this Court's numerous holdings that the public interest favors enforcing the government's contractual obligations and clear intent, it is puzzling for the government to rely on the provision of Section 207 of the Restatement (Second) of Contracts that when ambiguity exists—which it does not here—"a meaning that serves the public interest is preferred." *See* Pet. Br. 20. In any event, the government ignores the fact that comment *a* to that Section states that "it does not prefer the interest of a governmental agency as a party to a contract; government contracts are likely to be construed against the government as the drafting party."

tory provisions involved here, which specifically authorized the Insurance Corporation to enter exactly the type of contract it consummated with Glendale to facilitate the Broward merger. *Id.* at 40-41.

1. The government argues that, under the "reserved powers" doctrine, "core sovereign powers" cannot be contracted away. *Id.* at 12. The government then suggests that this doctrine applies here because "[t]he right to set future policy for thrift capital safety is a power exercised by Congress." *Id.* By the government's reasoning, therefore, the power to set thrift capital requirements is a "core sovereign power" simply because Congress has authority to legislate on the subject. If that is so, it follows necessarily that no government may ever enter into a binding contract concerning any subject within its legislative power. This boundless conception of the "reserved powers" doctrine is radical, wrong, and contrary to this Court's precedent.

First, as shown above, *supra*, pp. 30-32, by entering its contract with Glendale, the government was not abandoning a "core sovereign power"; it was simply advancing its own financial interest by inducing Glendale to assume the government's liabilities as the insurer of Broward's deposit accounts. Even the government must recognize that "the power [of a government] to enter into effective financial contracts cannot be questioned." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 24 (1977).

The "reserved powers" doctrine has *never* been applied to government financial obligations, and federal government bondholders rightly would be shocked to hear that the United States is even suggesting it could be. Yet the power to incur debt, like the power to set thrift capital standards—which in reality are simply financial underwriting requirements for federal deposit insurance—is "a power exercised by Congress." *See* U.S. Const. art. I, § 8, cl. 2. The "reserved powers" doctrine therefore does not, and should not, apply to Glendale's contract.

Second, even to the extent that Glendale's contract may touch upon regulatory matters, the contract is not invalid

for that reason. This Court has repeatedly held that the United States, and other sovereigns, can make binding contracts concerning a variety of regulatory matters that remain enforceable by a damages action following subsequent changes in pertinent regulatory law. *See, e.g., Wood v. Lovett*, 313 U.S. 362, 372 (1941) (validity of tax sales); *Appleby v. City of New York*, 271 U.S. 364, 380 (1926) (land sold will be "free from subsequent regulatory control"); *St. Cloud Pub. Serv. Co. v. City of St. Cloud*, 265 U.S. 352, 355 (1924) ("the governmental power of fixing and regulating . . . rates"); *Russell*, 233 U.S. at 206 (1914) (regulation of utility services); *American Smelting & Ref. Co. v. Colorado ex rel. Lindsley*, 204 U.S. 103, 113 (1907) (conditions for foreign corporations to do business); *see also United States v. Bekins*, 304 U.S. 27, 51-52 (1938) ("It is of the essence of sovereignty to be able to make contracts and give consents bearing upon the exertion of governmental power.").

This holds true even if the government later clothes its financial interests in an invocation of the "police power." *Lovett*, 313 U.S. at 372 ("It begs the question to say that the state may not abdicate the police power."); *see also W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56, 60 (1935) (Cardozo, J.) ("Even when the public welfare is invoked as an excuse, these bounds [of honoring government contracts] must be respected."). Thus, in the area of the government's own contracts, this court has unanimously held that "the police power" that relieves the government from paying damages for breach does not include all areas of legislative sovereignty, but rather extends only to regulations "necessary to protect the public health, or public morals." *New Orleans Gas Light Co.*, 115 U.S. at 665-69 (Harlan, J.).[28]

[28] None of the cases cited by the government extends beyond reserved powers over the uniquely important areas of public health and public morals. *See, e.g., Atlantic Coast Line R.R. v. City of Goldsboro*, 232 U.S. 548, 559-62 (1914) (train safety); *Douglas v. Kentucky*, 168 U.S. 488, 502-03 (1897) (same); *Butchers' Union Slaughter-House & Live-Stock Lending & Slaughter-House Co.*, 111 U.S. 746, 747-53 (1884) (food safety); *Stone v. Mississippi*, 101 U.S. 814 (1880) (lottery); *see also Contributors to the Pa. Hosp. v. City of Phila.*, 245 U.S. 20, 24 (1917) (city could take property to make a street pursuant to its "power of eminent domain upon just compensation").

As the Court explained in *Perry*, which involved a regulatory statute:

> There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter the substance of its own engagements.

294 U.S. at 350-51. The government's suggestion that no "police power" justification was offered for the government's action in *Perry*, Pet. Br. 42, is simply wrong. *See Perry*, 294 U.S. at 342-343 (government relied on the "police power," and argued that "[l]egislative powers cannot be expressly contracted away"). The Court in *Perry* squarely *rejected* the argument that "the government cannot by contract restrict the exercise of a sovereign power," *id.* at 353, observing that "[w]e do not so read the Constitution," *id.* at 350, and holding instead that "the right to make binding obligations is a competence attaching to sovereignty," *id.* at 353.

Ultimately, the enforceability of promises potentially involving, as here, or even embracing, a wide variety of government regulatory powers—particularly after *full* performance by the private party—is essential to modern government. Much of modern community and economic development hinges on negotiated zoning, regulatory and tax exemptions. Similarly, an effective private-public partnership in areas ranging from utility services to environmental, health, and welfare services funded by the government would be impossible if *United States Trust*, *Perry* and the other cases cited were to be overruled—and that is what adoption of the government's position on "reserved powers" would require.

2. The government's other contracting authority argument is merely a variation of its unsupported "second promise" theory. *See supra*, pp. 26-29. In this variation, an agency needs not only the statutory authority to "contract," it also needs the statutory authority to "limit[] Congress's future regulatory power." Pet. Br. 40. This "second authority" theory is also contrary to this Court's clear precedent and must be rejected.

Pursuant to 12 U.S.C. § 1729(f)(2), *see infra*, A2, the Insurance Corporation was authorized at the time of the Broward merger "to guarantee" acquiring institutions, such as Glendale, "against loss by reason of [their] merging or consolidating with or assuming the liabilities and purchasing the assets of" an "insured institution in or in danger of default," such as Broward. In the exercise of this authority, the Insurance Corporation did precisely that when it "guarantee[d]" Glendale's use of goodwill amortized over 40 years as the necessary protection "against loss" resulting from Broward's excess liabilities. Moreover, 12 U.S.C. § 1725(c)(3), *see infra*, A1, conferred on the Insurance Corporation plenary and unrestricted authority "[t]o make contracts." Pursuant to these provisions, the government's contracting officials had ample statutory authority to enter into contracts such as Glendale's. Indeed, the government conceded as much in the proceedings below. Pet. App. 161a n.8.

Nonetheless, the government now makes the extraordinary argument that the contracts made by the Insurance Corporation are *ultra vires* because the Insurance Corporation was not given still further authority to "limit[] Congress's future regulatory power." Pet. Br. 40. In nearly six years of litigation, however, the government has never identified a single statute that contains such a provision, and Glendale has never found one.[29] Under the

[29] In contrast, numerous government agencies and officials have what the Insurance Corporation had, the unrestricted authority to "make contracts." *See, e.g.*, 10 U.S.C. § 7522(a) (1994) (Navy officials); 15 U.S.C. § 2703(b) (1994) (Secretary of Energy); 20 U.S.C. § 1442 (1994) (contracts relating to children with disabilities); 49 U.S.C. § 1113(b)(1)(H) (Supp. 1995) (National Transportation Safety Board).

government's position here, a party seeking to obtain a binding federal contract must obtain special and unprecedented legislation from Congress. That requirement contravenes this Court's precedent and the constitutional framework for federal government contracts.

Lynch v. United States, 292 U.S. at 577-78, stands for a proposition squarely at odds with the government's proposed rule. *Lynch* involved significant contractual terms to which, as here, the agency had agreed, but Congress had not expressly agreed. *See id.* at 577 ("The terms of these contracts are to be found *in part in the* [insurance] *policy*, in part in the statutes under which they are issued and the regulations promulgated thereunder.") (emphasis added). Thus, contrary to the government's characterization of *Lynch* on this point, Pet. Br. 42, that case involved the same situation presented here: a contract made by an agency, not Congress, pursuant to statutory authorization that contained no express provision about binding any future Congress. The unanimous Court in *Lynch* nevertheless enforced the insurance rights at issue as "contracts of the United States." 292 U.S. at 576. Nor can *Lynch* be distinguished as a case involving a purely comcercial contract. *See supra*, p. 27.

The Insurance Corporation's plenary statutory authority "[t]o make contracts" was enacted 23 days after this Court issued its opinion in *Lynch*. 12 U.S.C. § 1725(c)(3) (original version at ch. 847, § 402, 48 Stat. 1256 (June 27, 1934)). Plainly, that statutory provision comports with *Lynch*'s understanding that the contract of any agency acting even with *general* statutory authority to contract is binding on the United States. *A fortiori*, the comprehensive "make contracts" provision combined with the specific statutory provision authorizing the Insurance Corporation to facilitate the Broward merger by "guarantee[ing]" Glendale "against loss by reason of" the

merger conferred ample contracting authority on the government's contracting officials here.

The government nevertheless urges the Court not to apply *Lynch*, but instead to apply a Contract Clause precedent, *Home Telephone & Telegraph Co. v. City of Los Angeles*, 211 U.S. 265 (1908). Pet. Br. 39-41. That decision is of no avail to the government for two reasons.

First, agencies and officers of "the United States can, without the authority of any statute, make a valid contract." *Jessup v. United States*, 106 U.S. 147, 152 (1882); *accord Moses v. United States*, 166 U.S. 571, 585-87 (1897). Specifically, the federal executive branch may "within the sphere of the constitutional powers confided to it . . . enter into contracts" so long as those contracts are "not *prohibited* by law, and [are] appropriate to the just exercise of" the executive's other statutory or constitutional powers. *United States v. Tingey*, 30 U.S. (5 Pet.) 115, 128 (1831) (Story, J.) (emphasis added).[30] As a result, an agency's contract can be "a binding contract between the [private party] and the United States," even with no authorizing statute. *Id.* This inherent source of a federal agency's power to contract reflects that an agency's contract is itself an exercise of the federal government's "general right of sovereignty" under the Constitution. *Id.*[31] Here, Glendale's contract was both authorized by statute and appropriate to the Insurance Corporation's other statutory powers to assist mergers

[30] By statute, the "Federal Savings & Loan Insurance Corporation," was "in the executive branch of the Government." 12 U.S.C. § 1437(a) (1988) (repealed 1989).

[31] The rule set forth in *Moses*, *Jessup*, and *Tingey* is consistent with 41 U.S.C. § 11 (1994) (original version at ch. 84, § 8, 12 Stat. 220 (1861)), which requires only that an agency's contract be "authorized by law," *not* by statute. Because, among other reasons, the Glendale contract was authorized by law and by statute, the government correctly has never attempted to invoke either 41 U.S.C. § 11 or 31 U.S.C. § 1341 (1994). *See New York Airways, Inc. v. United States*, 369 F.2d 743, 752 (Ct. Cl. 1966).

of failing insured institutions and thereby to avoid more costly liquidations.[32]

Second, the government's reliance on *Home Tel. & Tel.* is misplaced because there, unlike here, the state agency had no authority at all to enter into the contract. The government's reading of *Home Tel. & Tel.* ignores both the facts and the specific statutory provisions involved. Pet. Br. 40. The issue there was whether a city charter conferred on the city the power to enter contracts to fix rates for telephone service for a definite term. The Court held that the charter contained *no* general authority to make contracts and expressly *limited* the city's authority over the telephone service to the power "to regulate . . . and to fix and determine . . . charges," 211 U.S. at 274, language the court found "entirely unfitted to describe the authority to contract." *Id.* The Court also emphasized that its decision left intact prior holdings that municipal contracts guaranteeing specified rates were binding on the state where, unlike in *Home Tel. & Tel.*, the authorizing statute did confer authority to contract upon the municipality. *Id.* at 277 (citing *City of Cleveland v. Cleveland City Ry. Co.*, 194 U.S. 517, 534 (1904) (involving "comprehensive" contracting authority) and *Vicksburg v. Vicksburg Waterworks Co.*, 206 U.S. 496, 508 (1907) (involving "unrestricted" contracting authority)). These cases refute the rule urged by the United States because nothing in the authorizing statute in *Cleveland* or *Vicksburg* expressly stated that municipal contracts would "limit[] [the State's] future regulatory power." *See* Pet. Br. 40.

[32] Moreover, the Insurance Corporation here interpreted its own governing statute in concluding that it had authority to enter the Glendale contract. *See, e.g.*, J.A. 587, 608. Not only is that interpretation supported by that statute's plain language, but it is entitled to deference under *CFTC v. Schor*, 478 U.S. 833, 844-45 (1986), *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984), and similar cases. No principle of deference was mentioned or applicable in *Home Tel. & Tel.*

Here, both statutory provisions conferring authority upon the Insurance Corporation to enter the contract with Glendale meet the *Home Tel. & Tel.* test. The authority under 12 U.S.C. § 1725(c)(3) "[t]o make contracts" was, unlike the authority in *Home Tel. & Tel.*, both "comprehensive" and "unrestricted," and the authority under 12 U.S.C. § 1729(f)(2) "to guarantee [the acquiror] . . . against loss" was also well "[]fitted to describe the authority to contract." 211 U.S. at 274.

III. THE "SOVEREIGN ACTS" DEFENSE IS INAPPLICABLE TO GLENDALE'S CLAIM FOR CONTRACT DAMAGES.

In claiming the defense of "sovereign acts," the government does not, and cannot, deny that FIRREA and the OTS regulations contravene the goodwill terms of Glendale's contract. The government has now required Glendale to "deduct" hundreds of millions of dollars of goodwill from its capital, *see* 12 C.F.R. § 567.9(c) (1990), contrary to GAAP principles, whereas in the contract the government expressly promised that Glendale could use goodwill as an asset and amortize it over 40 years in accordance with GAAP. *See supra* pp. 21-23.

The government nevertheless argues that the "sovereign acts" defense applies to Glendale's contractual claim because FIRREA's goodwill provisions are "general," *i.e.*, they apply to both contractually-recognized goodwill, such as Glendale's, and other intangible assets. Pet. Br. 45. The "sovereign acts" defense cannot apply, however, merely because a statute covers more than government contracts; most statutes do, and *all* could be written that way. Thus, the government's argument would give Congress a license to extinguish all government contract liability. *Perry* and *Lynch* preclude the government's argument, which also is contrary to this Court's nonretroactivity precedent.

1. Both *Perry* and *Lynch* involved "public and general" legislation. Indeed, the statutes at issue there were far broader, and thus their impact less focused on government contracts, than is FIRREA. The statute in *Perry* established a system of payment for "every obligation," both public and private. 294 U.S. at 349 n.1. In fact the government, citing *Horowitz v. United States*, 267 U.S. 458 (1925), stated the statute was "public and general." *Perry*, 294 U.S. at 346. Similarly, in *Lynch*, the law at issue was a broad repeal of "all laws granting or pertaining to" wartime insurance policies, 292 U.S. at 575, which covered both "gratuities" and contractual commitments of the government, *id.* at 584-85. Despite the breadth of the statutes involved, the Court held in both cases that the government could not abrogate its own pre-existing contracts.

Indeed, *Perry* specifically explains that the breadth of the statute is not controlling:

> There is no question as to the power of the Congress to regulate the value of money . . . [t]he question is whether the Congress can use that power so as to invalidate the terms of the obligations which the government has theretofore issued . . . .

294 U.S. at 350. The Court held that Congress could not:

> The contention necessarily imports that the Congress can *disregard* the *obligations* of the Government at its discretion. . . . We do not so read the Constitution.

Id. (emphasis added).[33]

The impact of FIRREA's goodwill provisions is more focused on government contracts than were the "general" statutes in *Perry* and *Lynch*. Here, Congress adopted provisions *expressly* applicable *only* to "supervisory good-

---

[33] *Perry* also rejects the government's renewed attempt to find support for its expansion of the "sovereign acts" doctrine by making a comparison to a private party's defense of impossibility. Pet. Br. 43-44. *Perry* specifically rejected the government's argument that its own general statute created a defense of "impossibility of performance." 294 U.S. at 348. This is in accord with the rule that a private party cannot claim impossibility based on a supervening law or decree when its "own actions created the condition of impossibility." *W.R. Grace Co. v. Rubber Workers*, 461 U.S. 757, 767 n.10 (1983).

will," *see* 12 U.S.C. §§ 1464(t)(3)(A), 1464(t)(9)(A), (C), Pet. App. 198a, 203a, a phrase coined specifically for use in this statute to target transactions such as the government's contract with Glendale.[34] By contrast, in *Perry* the legislation applied to *all* debts, public and private, and in *Lynch*, Congress evidently did not even consider that government contracts would be affected. *See* 292 U.S. at 585 ("Congress apparently assumed that there was no difference between the legal status of these gratuities and the outstanding contracts.").

Finally, *Perry* and *Lynch* demonstrate that if Congress had intended FIRREA to extinguish government liability on Insurance Corporation contracts—or even if FIRREA had that unintended effect—such application would be unconstitutional under the Due Process Clause. As explained in *Lynch*:

> Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation.

Lynch, 292 U.S. at 580; *accord Perry*, 294 U.S. at 352-53. Thus, Congress was "without power" to do what the government asks this Court to use FIRREA to do under the guise of the "sovereign acts doctrine": to excuse the government from damages liability on its own contracts and thus "to lessen government expenditure."[35]

---

[34] Legislators understood that FIRREA's goodwill provisions would be applicable to "supervisory goodwill" recognized in pre-existing contracts, although Congress made no determination concerning the statute's effect on claims for breach of contract damages. *See, e.g.*, H.R. Rep. No. 54(I), 101st Cong., 1st Sess. 498 (1989) (Congress "has reneged on the agreements"); 135 Cong. Rec. H2783 (daily ed. June 15, 1989) (statement of Rep. Ackerman) ("the government is saying 'thanks for your help, but we don't need you anymore, we're breaking our promise' "); *see also* Pet. App. 94a-97a.

[35] *See also United States Trust Co.*, 431 U.S. at 29-32 & n.29 ("a State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the

2. Although the government's "sovereign acts" argument is predicated on enactment of a statute, FIRREA, the government does *not* argue that FIRREA *of its own force* bars Glendale's claim for contract damages. *See* Pet. Br. 46.[36] Rather, the government asks this Court to construe a judge-made rule—the "sovereign acts doctrine" —to do what Congress chose not to do.

The government's attempt to use FIRREA as a basis for barring damages on a pre-existing contract, rather than merely to require (or prohibit) prospective action by its contracting partner—here, Glendale—is an attempt to give that statute a retroactive effect. *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1500 & n.25, 1506-07 (1994). The federal courts will neither themselves create such a retroactive effect nor read one into a statute unless Congress has "clearly spoken." *Id.* at 1507. *See United States v. Larionoff*, 431 U.S. 864, 879 (1977) (statute will not be interpreted to release government from liability on pre-existing contract absent "a clear expression of Congressional intent").[37]

---

public good rather than the private welfare of its creditors"). Moreover, the government's interpretation of the "sovereign acts" doctrine would raise a grave question under the Takings Clause, and neither statutes nor judge-made doctrines should be construed to raise a possible taking of contractual rights. *E.g., United States v. Security Indus. Bank*, 459 U.S. 70, 76-82 (1982).

[36] No provision of FIRREA suggests, much less provides, that Glendale may not pursue a claim for contractual damages. There also are other strong indications that FIRREA's goodwill provisions did not bar claims for contractual damages. *See, e.g.*, H.R. Rep. No. 54(I) at 498 ("Under contract law, the institutions would have a right to sue for breach of contract damages . . . [T]he government . . . still may be liable for breach of contract damages."); *see* Letter from Carol T. Crawford, Assistant Attorney General, Department of Justice to Rep. Wylie, dated July 12, 1989 ("The federal courts are available to resolve any constitutional and contractual claims presented by adversely affected thrifts.") (A copy of this letter has been lodged with the Clerk's office.).

[37] *See also The Twenty Per Cent. Cases*, 87 U.S. (20 Wall.) 179, 187-88 (1873) ("there is not a word in the repealing Act to support the conclusion that Congress intended to rescind any ante-

The government does not even argue that Congress has "clearly spoken" to the issue of contract damages (*i.e.*, retroactivity) here. Thus, the government's position that the courts should use FIRREA to prevent breach-of-contract damages would nullify this Court's nonretroactivity precedents. Indeed, by resorting to an asserted federal common-law defense of "sovereign acts," the government concedes that it does not contend that *FIRREA itself* has spoken at all to this issue.[38]

3. The government's reliance on *Horowitz*, *see* Pet. Br. 43, is wholly misplaced, even apart from this Court's rejection of the same proposed expansion of *Horowitz* in *Perry* and *Lynch*.

a. *Horowitz* is a "federal common law" case. It involved a judge-made rule applicable to an administrative response to an emergency in an area not addressed by any statute. 267 U.S. at 459. In this case, by contrast, there is a detailed statute, FIRREA, and clear precedent requires interpreting that statute *not* to preclude damages claims for breach of contract. *See supra*, pp. 47-48. The government's "sovereign acts" argument thus ignores the Court's recent admonition that it would not adopt a federal common law "court-made rule to supple-

cedent contract, or to enact any bar to the right of recovery in such cases where the service had been faithfully performed before the repealing Act was passed"); *cf. De La Rama S.S. Co. v. United States*, 344 U.S. 386, 388-89 (1953) (applying the anti-retroactivity principles of 1 U.S.C. § 109 to government contracts and holding that nonretroactivity is "a principle of fair dealing. When the Government has entered upon a conventional commercial endeavor, such as the insurance business, it . . . offends standards of fairness for it to violate the principle of [nonretroactivity].").

[38] This nonretroactivity issue plainly falls within the third Question Presented, which concerns the effect of "the provisions of . . . FIRREA." Moreover, there can be no waiver of the nonretroactivity issue because this Court has long held that the courts always "retain[] the independent power to identify and apply the proper construction" of a statute. *E.g., United States Nat'l Bank v. Independent Ins. Agents of Am., Inc.*, 113 S. Ct. 2173, 2178 (1993); *see also O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048, 2055 (1994) (*sua sponte* raising issue of retroactivity of FIRREA).

ment federal statutory regulation [FIRREA] that is comprehensive and detailed." *O'Melveny & Myers*, 114 S. Ct. at 2054.[39]

b. *Horowitz* is also distinguishable because it did not involve a repudiation by the government of a contract. There, one government agency had committed to ship silk, but its performance was delayed by a general rail embargo imposed by the United States Rail Administration, a different agency. 267 U.S. at 459-60. The embargo was entirely unrelated to the government's contract, and affected it only incidentally. The embargo had neither as a purpose nor as a principal effect to prevent performance of the government's own contractual obligations. To the contrary, the government shipped the silk as soon as the embargo was lifted. *Id.* at 460.

Here, in contrast, the government seeks to avoid its contractual obligation altogether, after full performance by Glendale, in order to benefit the government financially. Pet. App. 45a ("the undisputed reason for limiting the use of the supervisory goodwill was precisely the reason the government used it in the first place—it is a money equivalent, not money"). Moreover, unlike the embargo in *Horowitz*, which affected both public and private contracts, FIRREA's goodwill provisions upset only contracts with the government.

c. The central and express governmental undertaking in Glendale's contract, upon which the entire contract depended, was the government's bargained-for promise to recognize Glendale's goodwill as capital. As demonstrated *supra* pp. 24-25, 28-29, the government contractually assumed the risk that Glendale's rights to use and amortize goodwill over 40 years would be different than those rights available to all thrifts by "statute or rule of law." J.A. 599. The courts charged with primary responsibility for federal government contracts have recognized as a basic

[39] Moreover, substantive law that the Constitution forbids the legislature to enact, courts may not create under the guise of "common law." *See, e.g., Detroit United Ry. v. Michigan*, 292 U.S. 238, 247 (1916) (Contract Clause claim).

principle of government contract law that the "sovereign acts" defense cannot excuse the government from its own contractually-assumed risks. *E.g.*, *Freedman v. United States*, 320 F.2d 359, 366 (Ct. Cl. 1963) ("The doctrine . . . laid down in *Horowitz* . . . does not relieve the Government from liability where it has specially undertaken to perform the very act from which it seeks to be excused."); *see Hills Materials Co. v. Rice*, 982 F.2d 514, 516 n.2 (Fed. Cir. 1992).[40] Thus, this additional reason precludes application of the "sovereign acts" defense to Glendale's contract.[41]

CONCLUSION

For the reasons stated, the judgment below should be affirmed.

Respectfully submitted,

CARTER G. PHILLIPS
RICHARD D. BERNSTEIN
THEODORE R. POSNER
JAMES P. YOUNG
SIDLEY & AUSTIN
1722 I Street, N.W.
Washington, D.C. 20006
(202) 736-8000

JESSE H. CHOPER
Berkeley, California 94720
(510) 642-0339

JERRY STOUCK *
JOE G. HOLLINGSWORTH
DONALD W. FOWLER
CATHERINE R. BAUMER
KATHLEEN M. MCGEEHIN
SPRIGGS & HOLLINGSWORTH
1350 I Street, N.W.
Ninth Floor
Washington, D.C. 20005
(202) 898-5800

Attorneys for Respondent Glendale Federal Bank, FSB

* Counsel of Record

March 29, 1996

---

[40] *See United States v. Bostwick*, 94 U.S. 53, 68-69 (1876), (property damage done by Army before term of government lease began was a noncompensable act of the sovereign, but all damage done during the term was recoverable as a "breach of the contract;" held, "All depends on the contract.").

[41] In any event, even if the government's sovereign acts or authority arguments were to prevail, Glendale would be entitled to restitution, *see, e.g., Gould v. United States*, 67 F.3d 925, 930 (Fed. Cir. 1995); Restatement (Second) of Contracts § 272 cmt. *b* (1981); 6 *Corbin on Contracts* § 1368, at 519-20 (1962), and, as the government has conceded regarding sovereign acts, to pursue its frustration of purpose and takings claims. Pet. Reply 10 n.6.

APPENDIX

APPENDIX

12 U.S.C. § 1725 (1976).

Creation of Federal Savings and Loan Insurance Corporation

(a) Creation, operation, and offices

There is created a Federal Savings and Loan Insurance Corporation (hereinafter referred to as the "Corporation"), which shall insure the accounts of institutions eligible for insurance as hereinafter provided, and shall be under the direction of the Federal Home Loan Bank Board and operated by it under such bylaws, rules, and regulations as it may prescribe for carrying out the purposes of this subchapter. The principal office of the Corporation shall be in the District of Columbia.

. . .

(c) Powers

On June 27, 1934, the Corporation shall become a body corporate, and shall be an instrumentality of the United States, and as such shall have power—

(1) To adopt and use a corporate seal.

(2) To have succession until dissolved by Act of Congress.

(3) To make contracts.

* * *

12 U.S.C. § 1729(f) (Supp. V 1982) (amending 12 U.S.C. § 1729(f) (1976))*:

(1) In order to prevent a default in an insured institution or in order to restore an insured institution in default to normal operation, the Corporation is authorized, in its discretion and upon such terms and conditions as it may determine, to make loans to, to purchase the assets of, or to make a contribution to, an insured institution or an insured institution in default.

(2) Whenever an insured institution is in default or, in the judgment of the Corporation, is in danger of default, the Corporation may, in order to facilitate a merger or consolidation of such insured institution with another insured institution or the sale of the assets of such insured institution and the assumption of its liabilities by another insured institution and upon such terms and conditions as the Corporation may determine, purchase any such assets or assume any such liabilities, or make loans to such other insured institution, or guarantee such other insured institution against loss by reason of its merging or consolidating with or assuming the liabilities and purchasing the assets of such insured institution in or in danger of fault.

(3) No contribution or guarantee shall be made pursuant to paragraphs (1) or (2) of this subsection in an amount in excess of that which the Corporation finds to be reasonably necessary to save the cost of liquidating such insured institution in or in danger of default, but if the Corporation determines that the continued operation of such institution is essential to provide adequate savings or home financing services in its community, such limitation upon the amount of a contribution or guarantee shall not apply.

---

* 12 U.S.C. 1729(f) was amended by the Financial Institutions Regulatory and Interest Rate Control Act of 1978, § 105(b)(2), Pub. L. No. 95-630, 92 Stat. 3641.

Court of Federal Claims Rule 56(d): Summary Judgment

(d) Procedures. The following procedures shall be followed with respect to motions for summary judgment other than in actions seeking review of a decision on the basis of an administrative record:

(1) The moving or cross-moving party shall file, together with its motion, a separate document entitled Proposed Findings of Uncontroverted Fact. This document shall contain concise, separately numbered paragraphs setting forth all of the material facts upon which the party bases its motion and as to which the party believes there is no genuine dispute. Each paragraph shall contain citations to the opposing party's pleadings or to documentary evidence, such as affidavits or exhibits, filed with the motion or otherwise part of the record in the case.

(2) The opposing party shall file, together with its opposition or cross-motion, a separate document entitled Statement of Genuine Issues. This document shall respond by reference to specific paragraph numbers to those proposed findings of uncontroverted fact as to which it claims there is a genuine dispute. The party shall state the precise nature of its disagreement and give its version of the events, supported by record citations. The opposing party may also file proposed findings of uncontroverted fact as to any relevant matters not covered by the moving party's statement.

(3) The party may dispense with the documents called for in subdivision (d)(1)-(2) of this rule if they file, no later than the time of the initial motion, a comprehensive stipulation of all of the material facts upon which they intend to rely.

In determining any motion for summary judgment, the court will, absent persuasive reason to the contrary, deem the material facts claimed and adequately supported by the moving party to be established,

except to the extent that such material facts are included in the Statement of Genuine Issues and are controverted by affidavit or other written or oral evidence.

(16)

Supreme Court, U.S.
FILED
APR 17 1996
CLERK

No. 95-865

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

WINSTAR CORPORATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

34 pp

TABLE OF AUTHORITIES

Cases: Page

American Smelting & Ref. Co. v. *Colorado ex rel. Lindsley*, 204 U.S. 103 (1907) 16
Amino Brothers Co. v. *United States*, 372 F.2d 485 (Ct. Cl.), cert. denied, 389 U.S. 846 (1967) 21
Appleby v. *City of New York*, 271 U.S. 364 (1926) .. 16
Atlas Corp. v. *United States*, 895 F.2d 745 (Fed. Cir.), cert. denied, 498 U.S. 811 (1990) 22
Bowen v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986) 15, 23, 25
Charter Fed. Sav. Bank v. *OTS*, 976 F.2d 203 (4th Cir. 1992), cert. denied, 507 U.S. 1004 (1993) 3
City of Cleveland v. *Cleveland City Ry.*, 194 U.S. 517 (1904) 20
City of Paducah v. *Paducah Ry.*, 261 U.S. 267 (1923) 17
Deming v. *United States*, 1 Ct. Cl. 190 (1865), appeal dismissed, 76 U.S. (9 Wall.) 145 (1870) .. 25
FDIC v. *Philadelphia Gear Corp.*, 476 U.S. 426 (1986) 15
Guerini Stone Co. v. *P.J. Carlin Constr. Co.*, 240 U.S. 264 (1916) 4
Heil v. *United States*, 273 F. 729 (S.D.N.Y. 1921) .. 14
Home Tel. & Tel. Co. v. *City of Los Angeles*, 211 U.S. 265 (1908) 16, 17, 20, 21
Horowitz v. *United States*, 267 U.S. 458 (1926) 21, 25
Jefferson Branch Bank v. *Skelly*, 66 U.S. (1 Black) 436 (1862) 15, 16
Lynch v. *United States*, 292 U.S. 571 (1934) 14, 16, 18, 23
Maryland v. *Railroad Co.*, 89 U.S. (22 Wall.) 105 (1874) 12
New Orleans Gas Co. v. *Louisiana Light Co.*, 115 U.S. 650 (1885) 17
Norman v. *Baltimore & O.R.R.*, 294 U.S. 240 (1935) 23
Perry v. *United States*, 294 U.S. 330 (1935) 22, 24

Cases—Continued: Page

Peterson v. *United States Dep't of the Interior*, 899 F.2d 799 (9th Cir.), cert. denied, 498 U.S. 1003 (1990) 3
Russell v. *Sebastian*, 233 U.S. 195 (1914) 16
St. Cloud Pub. Serv. Co. v. *City of St. Cloud*, 265 U.S. 352 (1924) 16, 17
Slater v. *Emerson*, 60 U.S. (19 How.) 224 (1857) .. 12
Sturges v. *Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819) 12
Transohio Savings Bank v. *Director, OTS*, 967 F.2d 598 (D.C. Cir. 1992) 3
United States v. *Gaubert*, 499 U.S. 315 (1991) 15
United States v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963) 15
Vicksburg v. *Vicksburg Waterworks Co.*, 206 U.S. 496 (1907) 20
Wood v. *Lovett*, 313 U.S. 362 (1941) 16

Constitution, statutes and rules:

U.S. Const.:
Art. I, § 8, Cl. 2 24
Amend. XIV, § 4 24
Act of Oct. 6, 1917, ch. 105, Art. IV, 40 Stat. 409-410 18
Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990, Pub. L. No. 101-647, Tit. XXV, 104 Stat. 4859:
§ 2551, 104 Stat. 4889 9
§ 2552, 104 Stat. 4889 9
§ 2556, 104 Stat. 4892 9
12 U.S.C. 1464(a) (1988) (repealed) 14
12 U.S.C. 1464(b) (1988) (repealed) 14
12 U.S.C. 1464(s) (1988) (repealed) 14
12 U.S.C. 1725(a) (1988) (repealed) 14
12 U.S.C. 1725(c)(3) (1988) (repealed) 18
12 U.S.C. 1726(b) (1988) (repealed) 14
12 U.S.C. 1729(f)(2) (1988) (repealed) 18
12 U.S.C. 1730(t) (1988) (repealed) 14

Statutes and rules—Continued: Page

31 U.S.C. 1341(a)(1)(B) 18
41 U.S.C. 11(a) 18
Ct. of Fed. Cl. R.:
Rule 56(d)(1) 7, 4a
Rule 56(g) 7, 6a

Miscellaneous:

William Black, *Ending Our Forebearers' Forbearances: FIRREA and Supervisory Goodwill*, 2 Stan. L. & Pol'y Rev. 102 (1990) 10, 11, 12
FDIC, *1994 Annual Report* (1995) 9
GAO, *Financial Audit: Resolution Trust Corporation's 1994 and 1993 Financial Statements* (1995) 9
Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* (1986) 11
National Commission on Financial Institutions Reform, Recovery and Enforcement, *Origins and Causes of the S&L Debacle: A Blueprint for Reform, A Report to the President and Congress of the United States* (1993) 9, 10, 11, 12
Susan Rose-Ackerman, *Risk Taking and Ruin: Bankruptcy and Investment Choice*, 20 J. Legal Stud. 277 (1991) 11

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-865

UNITED STATES OF AMERICA, PETITIONER

v.

WINSTAR CORPORATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondents in these cases argue that Congress breached contracts with them when, in enacting FIRREA in 1989, it strictly limited the amount of intangible assets that federally insured savings and loan associations could use to satisfy federal capital requirements. In respondents' view, federal bank regulators had made binding contractual promises to them that Congress would not take such regulatory action or that, if it did, it would exempt respondents from the application of the new regulations.

It would be quite unusual, to say the least, for federal regulatory officials to purport to make binding promises

to those whom they regulate that Congress would not take future regulatory action that might be necessary to protect the public interest. As we show in our opening brief, no such promises were made here. When promises were made, they provided only that, to the extent that "goodwill" or "capital credits" could legally be treated as assets by thrifts, respondents could account for those intangibles on their books in certain ways. Such promises about the accounting treatment to be accorded assets were within the competence of bank regulators to make and were not breached in these cases.

Reading the documents upon which respondents rely to refer to the accounting treatment to be accorded goodwill and capital credits, rather than to the right to treat these intangibles as assets regardless of Congress's attempts to exercise its regulatory power to protect the solvency of the nation's banking systems, is, we submit, the most natural interpretation of the relevant language. If there are any ambiguities in the language, however, this Court has made clear that such ambiguities must be resolved in favor of Congress's ability to exercise its powers free of the threat of damage claims for breach of contract. Any alleged contractual limitation on Congress's exercise of its sovereign powers thus must be unmistakably clear. The court of appeals' failure to apply that principle in these cases led it to misconstrue the documents upon which respondents rely, and incorrectly to impose breach-of-contract liability on the United States for Congress's decision to adopt stricter capital requirements in an effort to restore solvency to the nation's thrift industry.

1. Respondents repeat their claims that the thrift regulators promised that the government would count respondents' supervisory goodwill (and, in Statesman's case, capital credits) as capital for purposes of satisfying federal capital requirements for periods of 25 to 40 years. Repetition of those claims does not substitute for their failure to obtain such promises in the terms of the contracts at issue.

a. *Glendale.* Glendale concedes (Br. 21) that the "critical terms" on which it relies were not included within the four corners of the contract between the parties—the Supervisory Action Agreement (SAA). Instead, Glendale claims (*ibid.*) that they were "contained in documents [primarily, Bank Board Resolution 81-710 (J.A. 605-610)] that were included in the contract through the integration clause of the SAA."[1]

As the language of the integration clause of the SAA makes clear, however, the SAA, "together with an interpretation thereof or understanding agreed to in writing by the parties, constitutes the entire agreement between the parties thereto." J.A. 598-599. That sentence precludes construing the Bank Board Resolution as a statement of the parties' contractual undertakings. The Bank Board was, in the first place, not a "party" to the SAA. See J.A. 587. Nor did the SAA parties (FSLIC and Glendale) ever "agree * * * in writing" to the Board's Resolution, which in all events was a statement of regulatory policy, not a contractual "understanding."[2] Ac-

[1] Glendale does not claim that the Bank Board Resolution itself or the terms contained in it would have constituted contractual commitments of the government, absent the integration clause in the SAA. Such documents were the record of the Bank Board's regulatory actions, which the Board remained free to change, in accordance with applicable legal standards governing agency action. See, *e.g.*, *Charter Fed. Sav. Bank* v. *OTS*, 976 F.2d 203, 211 (4th Cir. 1992), cert. denied, 507 U.S. 1004 (1993); see also *Transohio Savings Bank* v. *Director, OTS*, 967 F.2d 598, 621 (D.C. Cir. 1992); cf. *Peterson* v. *United States Dep't of the Interior*, 899 F.2d 799, 811 n.17, 813 n.18 (9th Cir.), cert. denied, 498 U.S. 1003 (1990).

[2] The Bank Board Resolution (J.A. 605-610) carries all of the conventional earmarks of an agency regulatory determination, not a contract. It begins with the factual premises for the agency's action (the "whereas" clauses, J.A. 605-606), and continues with

cordingly, nothing in the integration clause could possibly have converted the Bank Board's statements into contractual undertakings of the government.

Under the integration clause, the Bank Board Resolution did become part of the Glendale contract for the purpose of determining what occurs in the event of a conflict between the SAA and the Bank Board Resolution: in that situation, nothing in the SAA "supersede[s]" the Bank Board Resolution. J.A. 599. That reference did not, however, convert the Resolution's statements of regulatory policy into contractual commitments.[3] Cf. *Guerini Stone Co.* v. *P.J. Carlin Constr. Co.*, 240 U.S. 264, 277 (1916) ("[A] reference by the contracting parties to an extraneous writing for a particular purpose makes it a part of their agreement *only for the purpose specified*.") (emphasis added) (citing cases).

Most of Glendale's remaining arguments (Glendale Br. 22-26) regarding the meaning of the provisions in the Bank Board Resolutions and other documents are addressed in our opening brief (at 25-26, 28). The Peat, Marwick letter submitted by Glendale (see Glendale Br. 22) after the transaction could not possibly constitute an additional contractual commitment by the government. As the Bank Board Resolution required, that letter was submitted so that the Board could determine "the reasonableness of amounts attributed to goodwill * * * and

---

the resolution clauses themselves, J.A. 606 ("Now therefore, it is resolved * * *"), J.A. 607-610 ("Resolved further, * * *"), which granted the necessary regulatory approval to Glendale's transaction.

[3] The Winstar integration clause, see J.A. 112, is virtually identical to the integration clause in *Glendale*. The Statesman integration clause, on the other hand, provides that "[t]his Agreement, together with any resolutions adopted by the Bank Board and documents delivered at closing * * *, constitutes the entire agreement between the parties." J.A. 407-408. This provision is discussed in our opening brief, at 32-36. Statesman's claim regarding capital credits must be rejected in light of the unmistakability doctrine.

the resulting amortization periods" for purposes of applying its then-current policy. J.A. 607. Had the letter been insufficient for those purposes, the Bank Board could have rescinded its approval of the transaction. The letter, generated by Glendale's accountants, obviously did not and could not include any new contractual commitment by the government not already made in the SAA, and the approval of the letter by the Bank Board's agent could not be construed to have made any such new commitment.

b. *Winstar* and *Statesman*. Like Glendale, Winstar and Statesman also argue that their contracts included commitments by the government regarding the future treatment of supervisory goodwill.[4] We addressed those claims, as well as Statesman's claims regarding capital credits, in our opening brief. See U.S. Br. 28-36.[5]

---

[4] As noted in our opening brief, Winstar's Assistance Agreement expired in 1986, and any government obligations in that agreement therefore expired long before FIRREA was enacted. Winstar argues (Br. 30 n.19) that the expiration clause of its agreement is prefaced by the phrase "[e]xcept as otherwise specifically provided in this Agreement." J.A. 110. There is, however, no reference to supervisory goodwill anywhere within the four corners of Winstar's Assistance Agreement, and any commitments made in the Bank Board Resolutions and other regulatory documents would not appear to be commitments "*in* this Agreement." Nor do those other documents "specifically provide" for any extended expiration date. Statesman claims (Br. 26) that its Regulatory Capital Maintenance Agreement (RCMA) (J.A. 419) contains a contractual commitment regarding its capital credits and supervisory goodwill. Any such commitment, however, was only "[f]or purposes of this Agreement." J.A. 419. The RCMA was never violated, and any such commitment is accordingly of no significance.

[5] Respondents also rely on statements in Bank Board documents and made by Bank Board officials in the course of negotiations. See, *e.g.*, *Winstar* Br. 27 n.15, 30 n.18. At most, those statements demonstrate that the Bank Board anticipated that supervisory goodwill would be booked in connection with the transaction and that that was consistent with then-current Bank Board policy.

Winstar and Statesman both rely on the Accounting Principles clause in their Assistance Agreements. Winstar Br. 22-24, 28-29. For the reasons given in our opening brief (at 30-31), those provisions (J.A. 108-109, 458-459), which apply to "any computations made for purposes of this Agreement," in fact support our argument. Winstar complains (Br. 29), however, that we have not "explain[ed] what 'computations made for the purposes of this Agreement' the clause could possibly be referring to if not regulatory capital computations." The clause refers to computations that had to be made for purposes of provisions of Winstar's Assistance Agreement that, for example, required FSLIC to make a cash contribution to Winstar based on its "aggregate negative Net Worth" (J.A. 97), that required FSLIC to indemnify Winstar for undisclosed liabilities and claims (J.A. 100-101), and that limited FSLIC's potential indemnity contributions with regard to subsidiary corporations to an amount determined by "[Winstar's] investment in [those] subsidiary corporation[s]" (J.A. 102-103). See also, *e.g.*, J.A. 362-368, 368-373, 373-374, 380 (comparable Statesman provisions).

2. In short, the government never made the promises regarding supervisory goodwill that respondents claim. Such promises could have been stated in simple language. For example, the parties could have provided that, "regardless of any changes that may be made in applicable federal statutes or regulations, [the thrift] may count supervisory goodwill created in this transaction as capital for purposes of satisfying federal capital requirements for the next [25, 35, or 40] years." Or they could have provided that, "for the purposes of satisfying federal capital requirements, the supervisory goodwill created in this transaction shall be credited to the [thrift's] regulatory capital account and shall constitute regulatory capital, such capital to be recognized until amortized over [25, 35, or 40] years." See J.A. 362a; see U.S. Br. 34. That is not what the contracts in this case provided. Respondents' after-the-fact effort to revise their contracts to add promises that were never made should be rejected.

Respondents argue that their contracts should be construed to contain the promise that they would continue to have the right to keep supervisory goodwill on their books, despite any statutory changes limiting the use of intangible assets, because the transactions as embodied in the documents would otherwise be "financially nonsensical in light of the value of the consideration that [FSLIC] received from [respondents]." Glendale Br. 30;[6] see also Winstar Br. 19. As we explain in our

---

[6] Glendale suggests (Br. 32-34) that we conceded that the parties intended to make the contractual promise that goodwill could continue to be treated as an asset despite statutory changes. Glendale bases that alleged concession on what it claims was our failure to contest its Proposed Findings of Uncontroverted Fact in the Court of Federal Claims under Court of Federal Claims Rule 56(d)(1). App., *infra*, 4a. That Rule was inapplicable in this case, however, and neither court below relied on it or otherwise suggested that we had made the alleged concession. Discovery in this case was stayed from an early date until at least the time the Court of Federal Claims issued its decision on reconsideration in *Winstar* (Pet. App. 153a-180a) on April 21, 1992. On that date and on May 6, 1992, the trial court requested further briefing from the parties regarding the effect of its *Winstar* rulings on Glendale's case, but the trial court did not reopen discovery. Accordingly, we filed an affidavit (*reprinted at* App., *infra*, 1a-2a) pursuant to Court of Federal Claims Rule 56(g). See App., *infra*, 6a. That affidavit rendered Rule 56(d)(1) inapplicable. The affidavit stated that, insofar as the trial court was inclined not to grant our motion to dismiss and to grant summary judgment to Glendale, such "a ruling * * * would be premature, as [the government] has not had an opportunity to obtain discovery as to certain issues raised in plaintiff's motion for summary judgment." App., *infra*, 2a. Our position was that, although we did not dispute that the key documents (the SAA, the Bank Board Resolutions, and the Peat, Marwick letter) were each what they purported to be, any ruling that relied on other materials or affidavits to discern the intent of the parties would be premature, because we had not had sufficient

opening brief (at 27 & nn.19-20), that is incorrect.[7] At the time of Glendale's transaction, no change in federal policy permitting thrifts to count supervisory goodwill as capital was imminent, and such a change was not in fact made until eight years later.[8] Although, as respondents state, such a change immediately after an acquisition could subject a thrift to immediate danger of closure, it would also impose the costs of such closure on the Insurance Fund—precisely the outcome that all parties agree the Bank Board was trying to avoid. See Glendale Br. 3-4; Winstar Br. 3-5. Indeed, it was only Congress's unprecedented decision to invest well over $100

---

opportunity for discovery on those issues. The trial court appeared to accept our position, relying in the portions of its summary judgment ruling regarding Glendale (Pet. App. 114a-120a, 122a-125a) on no materials aside from the key contractual documents. Glendale cannot rely on a mistaken interpretation of a Court of Federal Claims Rule that neither that court nor the Federal Circuit has accepted.

[7] Respondents assert that the government claims "that it is even entitled under the law to keep the multi-million dollar investments that it solicited from Statesman and Winstar and then seized along with the thrifts." Winstar Br. 13. In fact, respondents' investments were not funds given to the government, but funds invested in the thrifts; when Statesman and Winstar were ultimately closed, the Insurance Fund had to make up a very substantial shortfall. In a similar vein, respondents allege that our claim is "that [the government] made no promises and assumed no risks in connection with [the] transactions." Winstar Br. 20. The contracts with Winstar and Statesman, however, include numerous examples of government promises—such as the indemnification provisions, see p. 6, *supra*—all of which were performed. Moreover, because the government remained responsible after the transaction, as before, for the insured deposits under the control of respondents at each of the thrifts involved, the government itself assumed significant risks in permitting the transactions to go forward.

[8] Federally insured thrifts always operate against a background risk that the laws (or regulations) regarding financial soundness (or other regulatory matters) will be altered in a way that would threaten them with closure. See U.S. Br. 27 n.19.

billion to bail out the Insurance Fund that led to FIRREA's 1989 alteration of federal policy.[9]

Prior to that time, respondents obtained very substantial benefits as the result of the transactions in this case. Indeed, it was the profit-making potential of those transactions that led respondents to engage in them. For example, Glendale obtained the right to do business in Florida, a lucrative new market where, at the time it filed this action, it had the "largest branch network of any thrift." J.A. 561.[10] It also acquired the assets of a large thrift institution and the substantial profit potential that those assets represented. In addition, Glendale obtained the going-concern value of the acquired thrift, a provision protecting it against rising interest rates, indemnification against unknown liabilities of the acquired thrift, and a variety of short-term cash advances. See U.S. Br. 43.[11]

---

[9] Congress made more than $105 billion available to the Resolution Trust Corporation, in four separate statutes. See GAO, *Financial Audit: Resolution Trust Corporation's 1994 and 1993 Financial Statements* 7 (1995). According to the most recent figures, only approximately $90.2 billion, however, was expected to be spent. See *ibid.* In addition to the RTC funds, the FLSIC Resolution Fund has an accumulated deficit of $43.7 billion. See FDIC, *1994 Annual Report* 95 (1995).

[10] In the Statesman and Winstar cases, the acquirers were new to the thrift industry. They obtained extremely valuable franchises to participate in the industry—franchises that were believed at the time to offer the key to high profits on a variety of types of loans, with most of the risk being borne by the deposit insurance fund. See National Commission on Financial Institutions Reform, Recovery and Enforcement, *Origins and Causes of the S&L Debacle: A Blueprint for Reform, A Report to the President and Congress of the United States* 45-47 (1993) [hereinafter *Blueprint*]. See Pub. L. No. 101-647, Tit. XXV, §§ 2551-2552, 2556, 104 Stat. 4889, 4892 (statute requiring appointment and setting mission for commission).

[11] The interest rate protection provision provided for payments from the government to Glendale if interest rates went up, and

Indeed, Glendale's own assets increased from about $5 billion at the time of the merger in 1981, see J.A. 550, to more than $25 billion at the time it filed suit in 1990, see J.A. 546. That increase alone suggests that Glendale's participation in the transaction was a reasonable choice.[12]

In addition, as commentators have explained, even if an acquiring thrift like Glendale showed a positive net worth on its books, such thrifts "were frequently insolvent * * * on a market value basis." William Black, *Ending Our Forebearers' Forbearances: FIRREA and Supervisory Goodwill*, 2 Stan. L. & Pol'y Rev. 102, 104 (1990).[13] In that situation, because the acquiring thrift's owners face no risk of further loss to themselves, the acquiring thrift

> has every incentive to take extreme risks, which promise the possibility of very high yields. If the gamble pays off, the owners of the S&L or bank capture all the profit; if the gamble fails, the FSLIC or the FDIC pays for the loss.

Ibid. Indeed, the general tendency of businesses with little of their own capital at stake to take risks is well-documented,[14] and such high risk-taking was endemic in the thrift industry during the 1980s.

Finally, there were further incentives for those in all of respondents' positions to acquire thrifts. Of perhaps greatest importance was the way in which such transactions could increase the apparent income of the thrift. As the commission charged by statute with investigating the causes of the thrift debacle explained, thrifts involved in mergers or acquisitions were able to amortize the "goodwill" created by the acquisition slowly while taking accelerated paper profits based on the presumptive increase in the face value of mortgages as they approached the end of their expected lives.[15] That enabled thrift

payments from Glendale to the government if they went down. See J.A. 591-593. Glendale notes (Br. 9) that, because interest rates went down, this provision in fact resulted in a payment of $18.24 million from Glendale to the government. The provision nonetheless was inherently beneficial for Glendale. Although the government was to have begun its payments from the first dollar, the provision expressly excused Glendale from having to pay the first $20 million it would owe under this provision. J.A. 593.

[12] Similarly, Statesman's net worth increased more than $6 million between its March, 1988, transaction and July 5, 1990. Winstar Br. 6-7. (Due to a typographical error, our opening brief erroneously states in one place that the Statesman transaction took place in 1987. U.S. Br. 32. In fact, it took place in 1988, as our brief elsewhere correctly states. See U.S. Br. 6.)

[13] Although Glendale's books indicated that it was solvent at the time of the transaction, the market value of its assets at the time of the transaction is a factual issue that has not been resolved in this case. During the 1980s, increasing numbers of thrifts that had appeared solvent turned out to have little or no capital when their assets were marked to market. See *Blueprint* 43-44, 52-54. Cf. J.A. 553-554 (¶ 32) (marking thrift assets to market produces dramatic decline in net worth).

[14] See, *e.g.*, Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* 205 (1986) ("When a firm is insolvent and has $100,000 in debts and only $80,000 in assets, it is unlikely that it would be in the interests of the creditors to have that $80,000 placed on number 20 at a roulette wheel in Atlantic City, but it clearly would be in the interests of the shareholders to do so."); Susan Rose-Ackerman, *Risk Taking and Ruin: Bankruptcy and Investment Choice*, 20 J. Legal Stud. 277, 296 (1991).

[15] The Commission explained:

> [The Bank Board] allowed and encouraged "goodwill mergers," in which the assets of an acquired S&L were marked down to market, and the difference between its liabilities and the market value of its assets * * * was designated as "goodwill[.]" * * * [O]nce the goodwill was recognized, GAAP allowed the "discount" of the market value of acquired assets from their book value to be "accreted" as income over the remaining expected life of the assets under the assumption that the assets' value would rise steadily to their book value. Because the "goodwill" fabricated from the acquisition was written off more slowly than acquired assets matured, the book income from "accretion of discount" exceeded the expense of

managers and owners to show large paper profits, permitting them to pay themselves high salaries and dividends. *Blueprint* 38. "Acquisitions of insolvent S&Ls were tempting to other S&Ls trying to stave off accounting insolvency because acquirers could show fictitious income and continue to pay (indeed increase) dividends, high salaries, and so on." *Id.* at 39. There were also substantial tax benefits connected with the transactions. See *id.* at 37-38.

There are thus many reasons why entirely reasonable individuals would have taken the risks inherent in the transactions at issue in this case. At bottom, though, the terms of the contracts themselves are the best evidence of the bargains that reasonable parties in the position of respondents would have struck. See, *e.g.*, *Slater* v. *Emerson*, 60 U.S. (19 How.) 224, 238 (1857); *Maryland* v. *Railroad Co.*, 89 U.S. (22 Wall.) 105, 111-112 (1874); cf. *Sturges* v. *Crowninshield*, 17 U.S. (4 Wheat.) 122, 202 (1819). Indeed, respondents' own arguments that it

---

depreciating goodwill. Consequently, the acquirer could lock in accounting profits over the life of the acquired assets.

Blueprint 38-39.

As another commentator has noted, although goodwill was typically amortized over periods of 25 to 40 years, the thrifts' assets were overwhelmingly composed of home mortgages. "Because of prepayments (typical when a home is sold) and refinancings, the estimated life of a new 30-year fixed-rate loan is approximately seven years." Black, *supra*, 2 Stan. L. & Pol'y Rev. at 105. "If the average expected *remaining* life of the [acquired institution's] loans is five years, the annual accretion of discount is 20 percent." *Ibid.* Therefore, if goodwill and discount resulting from a merger are each $100 million,

> [i]n year one after the merger, 2.5 percent amortization of goodwill requires the S&L to recognize $2.5 million in expense. At a 20 percent annual rate for the accretion of discount, however, the boost to income in year one is $20 million. The net effect is $17.5 million in added *accounting* profits.

Ibid. "The larger the goodwill, i.e., the more the acquiring S&L overpaid for the failed S&L, the greater the reported profits." *Ibid.*

would have been "madness" to enter into the contracts at issue, Glendale Br. 31, makes it incomprehensible why respondents' able attorneys would have failed to demand that the promises they now claim to have been vital—promises that they would be permitted to count goodwill as capital for purposes of federal regulatory requirements, regardless of statutory or regulatory changes—be included in clear language in the contracts.

3. Under the unmistakability doctrine, a government contract will be construed to include a promise that the government will exercise its sovereign regulatory authority in the future in a certain way only if that promise is given in unmistakable terms. See U.S. Br. 16-22.[16] That does not mean, as respondents assert, that the contract must contain certain talismanic words, or that there must be both an initial promise that the government will exercise regulatory authority in the future in a specific way and a "second promise that Congress would not enact 'new regulatory legislation.'" Glendale Br. 26; see Winstar Br. 31-35. As noted above, there are various ways to phrase an unmistakable promise that a thrift may continue to count goodwill created in the transaction as capital, despite future changes in regulatory law or policy.

Respondents allege that the unmistakability doctrine is inapplicable in this case because the contracts at issue here involved "*commercial* transactions in which both

---

[16] Winstar and Statesman appear to defend (Winstar Br. 36-38) the Federal Circuit's conclusion that the unmistakability doctrine does not apply to actions seeking monetary damages for breach of contract. We respond to that argument in our opening brief (at 20-22). Glendale no longer defends the Federal Circuit's conclusion on that point, and now relies instead on the claim that the contract in this case is a "financial" contract. See Glendale Br. 18 ("Glendale's point is not that the unmistakability principle has no application to *any* claim for breach-of-contract damages. Rather, the principle does not apply to a damages claim for the government's breach of a contract entered into *for its own financial benefit.*"). See pp. 13-14, *infra*.

parties were motivated by their own *economic* interests." Winstar Br. 39; see also Glendale Br. 18 (unmistakability principle "does not apply to a damages claim for the government's breach of a contract entered into *for its own financial benefit*"). That claim is incorrect. Application of the unmistakability doctrine has nothing to do with whether the contract at issue provides an economic benefit to the government.

As we explain in our opening brief (at 20 n.9), the unmistakability doctrine applies where the performance of the alleged promise by the government requires it to exercise—or not to exercise—uniquely governmental regulatory authority in a certain way in the future. Where, on the other hand, the performance required of the government is precisely the kind of performance that private parties typically render—such as the payment of a sum of money, see, *e.g.*, *Lynch* v. *United States*, 292 U.S. 571 (1934), or the delivery of a telegram, see, *e.g.*, *Heil* v. *United States*, 273 F. 729 (S.D.N.Y. 1921) (Hand, J.) —the doctrine has no application.

The regulatory authority relevant to this case was the authority of Congress and the Bank Board to set minimum capital requirements for federally insured thrifts and to regulate the types of assets that may count toward meeting those requirements. See 12 U.S.C. 1464(a), (b) and (s), 1725(a), 1726(b), 1730(t) (1988) (repealed). As respondents recognize, they claim "promises to accord specified *regulatory* treatment to respondents' supervisory goodwill * * *, promises that obviously could not have been made by a private party." Winstar Br. 47. That regulatory authority is not comparable to any authority that an ordinary commercial entity could unilaterally exercise in an ordinary commercial setting. Regulation of thrift industry capital levels, like other aspects of bank regulation, is a regulatory function that is essential to preserve the health and safety of the industry and, ultimately, to avoid severe damage to the national economy. See generally *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426, 432-433 (1986); *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 327-328, 329-330 (1963); see also *United States* v. *Gaubert*, 499 U.S. 315, 332 (1991). It is exactly the sort of federal regulatory authority protected by the unmistakability doctrine.

The contractual promises that respondents allege would have committed federal officials and Congress to exercise federal regulatory authority in a particular way—*i.e.*, to permit respondents to continue to count supervisory goodwill toward satisfying federal capital requirements for periods of 25 to 40 years in the future. The contracts therefore may not be construed to surrender that regulatory authority "unless such surrender has been expressed in terms too plain to be mistaken." *Jefferson Branch Bank* v. *Skelly*, 66 U.S. (1 Black) 436, 446 (1862). See also *Bowen* v. *Public Agencies Opposed to Social Security Entrapment (POSSE)*, 477 U.S. 41, 52-53 (1986) (referring to "often-repeated admonitions that contracts should be construed, if possible, to avoid foreclosing exercise of sovereign authority"); U.S. Br. 16-18 (citing cases).

The unmistakability doctrine does not preclude the government from committing itself to future exercises of sovereign regulatory authority (assuming such authority is the sort that may be the subject of a contract in the first place, see U.S. Br. 36-43). But what respondents themselves (Winstar Br. 32) term "venerable and sensible rule of construction" does require that such commitments will not be recognized unless they are unmistakable. See U.S. Br. 16-20. Respondents were represented by counsel, who could have been expected to know that commitments regarding future exercise of federal regulatory authority cannot be the product of indirection or ambiguity.

4. Because the contracts in this case did not contain the promises that respondents claim—and because, under the unmistakability doctrine, they may not be construed

to contain those promises—this Court need not reach the question whether the thrift regulators had the authority contractually to commit the government not to exercise regulatory authority over respondents for periods of 25 to 40 years. If that issue is reached, however, the Court should conclude that the thrift regulators had no authority to enter into such contracts. See U.S. Br. 36-43.

a. Glendale argues extensively (Br. 37-39) that the "reserved powers" doctrine, which precludes state governments from entering into binding contracts regarding essential attributes of sovereignty, would not apply to the type of government contractual commitment allegedly made here. The cases that Glendale cites (Br. 37-38) concern contracts for sales of land by a government entity and contracts concerning the regulation of utility rates, rates of corporate taxation, and the method of payment of debts owed by the government. See, *e.g.*, *Wood* v. *Lovett*, 313 U.S. 362, 372 (1941) (sale of land); *Appleby* v. *City of New York*, 271 U.S. 364, 380 (1926) (same); *St. Cloud Pub. Serv. Co.* v. *City of St. Cloud*, 265 U.S. 352, 355 (1924) (utility rates); *Russell* v. *Sebastian*, 233 U.S. 195 (1914) (same); *American Smelting & Ref. Co.* v. *Colorado ex rel. Lindsley*, 204 U.S. 103, 113 (1907) (corporation franchise tax); *Lynch* v. *United States*, 292 U.S. 571 (1934) (payment of debts in gold).

We agree that the cases cited by Glendale do not involve the exercise of "reserved powers" that are never subject to contractual restriction. Indeed, the cases we ourselves rely upon have made clear that the government may—if it does so in unmistakable terms—make enforceable contractual commitments regarding allowable utility rates, see *Home Tel. & Tel. Co.* v. *City of Los Angeles*, 211 U.S. 265, 273 (1908), or rates of taxation, see *Jefferson Branch Bank* v. *Skelly*, 66 U.S. (1 Black) at 450. Our argument is that Congress should not be deemed to have granted the authority to agency officials

to make such regulatory commitments absent an express and completely clear grant of authority to do so. As we note in our opening brief (at 39-40), this Court's decision in *Home Tel. & Tel.* makes clear that, because a contract term like the one claimed by respondents "has the effect of extinguishing *pro tanto* an undoubted power of government, *both its existence and the authority to make it* must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power." 211 U.S. at 273 (emphasis added). See also, *e.g.*, *St. Cloud Public Serv. Co.* v. *City of St. Cloud*, 265 U.S. at 356; *City of Paducah* v. *Paducah Ry.*, 261 U.S. 267, 272 (1923).[17]

This does not mean, as Glendale contends (Br. 41), that "a party seeking to obtain a binding federal contract must obtain special and unprecedented legislation from Congress." Where the contract does not involve commitments regarding future government regulatory policy, the *Home Tel. & Tel.* rule has no application. Moreover, even where sovereign regulatory authority is involved,

[17] Glendale relies (Br. 38) on *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U.S. 650 (1885). There was no question of governmental authority or clarity of contractual commitment in that case. Yet this Court nonetheless made clear that the contractual grant of an exclusive franchise to a utility company was "not, in any legal sense, to the prejudice of the public health or the public safety" because the firm's activities that "prove[] to be injurious to the public health, the public comfort, or the public safety, may notwithstanding the exclusive grant to plaintiff, be prohibited by legislation, or by municipal ordinance passed under legislative authority." *Id.* at 671, 672. See also *id.* at 672 (State is not "obstruct[ed] in the exercise of her power to provide for the public protection, health, and safety"). Under the logic of respondents' theory, however, FSLIC would have had authority to exempt particular thrifts from capital requirements altogether for decades—or permanently. A contract committing the government to permit certain thrifts to operate in an unsafe manner would surely obstruct the government's "power to provide for the public protection, health, and safety."

what is necessary (assuming the authority is of the sort that can be the subject of contract) is clear authorization from Congress for the federal agency to commit the government to a particular regulatory policy for the future. As Glendale contends (Br. 40), such grants of authority are rare. Federal agencies generally are not expected to conduct regulatory policy through contractual means.[18]

Glendale attempts (Br. 42-43) to distinguish *Home Tel. & Tel.* on the ground that federal officials have inherent general authority to enter into contracts. Even if correct,[19] that contention is of no assistance to respondents. Because the thrift regulators had general statutory authority "[t]o make contracts," 12 U.S.C. 1725(c)(3) (1988) (repealed),[20] the additional existence of inherent

[18] The only example of such a contract that respondents suggest (Glendale Br. 41) is the life insurance contract at issue in *Lynch* v. *United States*, *supra*. That contract did not commit the government to exercise its regulatory authority in any particular way in the future, and its execution therefore did not require an exceptionally clear grant of authority. Moreover, as we point out in our opening brief (at 42), the agency involved had specific authority from Congress to enter into the precise kind of yearly renewable term insurance contracts that it did. In addition, the key terms, providing for the amount of the premium and the government payment in the event of death or disability, were precisely spelled out in the statute. See Act of Oct. 6, 1917, ch. 105, Art. IV, 40 Stat. 409-410.

[19] But see 41 U.S.C. 11(a) ("No contract * * * on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfilment."); 31 U.S.C. 1341(a)(1)(B).

[20] In addition to the general authority to make contracts, Glendale relies as well (Br. 40) on the former thrift regulators' authority "to guarantee" acquiring institutions "against loss by reason of [their] merging or consolidating" with "an insured institution which is in default * * * [or] in danger of default." 12 U.S.C. 1729(f)(2) (1988) (repealed). The contractual commitments respondents allege, however, did not—and did not purport to—"guarantee" respondents "against loss" because of the mergers; they would simply have committed the government to continue to permit respondents to count supervisory goodwill as capital.

authority to do the same thing is of no significance. The *Home Tel. & Tel.* rule is based on the harm that may be caused when regulatory officials enter contracts that commit the legislature to certain regulatory policies that, in the public interest, the legislature may seek to change in the future. In those circumstances, a specific delegation of legislative authority to enter into such contracts is required.

Glendale also attempts (Br. 43) to distinguish *Home Tel. & Tel.* on the ground that the City of Los Angeles, whose contract was at issue there, "had no authority at all to enter into the contract." The City of Los Angeles did, however, have very substantial general authority, such as the authority "[t]o exercise all municipal powers necessary to the complete and efficient management and control of the municipal property, and for the efficient administration of the municipal government, whether such powers be expressly enumerated [in the City's charter] or not, except such powers as are forbidden or are controlled by general law." See 211 U.S. at 275 n.1. Moreover, the city charter specifically referred to the procedural requirements for the City to "mak[e] any contract." *Ibid.* That would clearly have been sufficient to authorize the City to enter procurement contracts—for example, to contract with the phone company for telephone service to be provided to City offices. But contracts committing the City to certain substantive rate regulation policies were another matter. The Court pointedly noted that it could "find no * * * provision in the charter which by any possibility can be held to authorize a contract *upon this important and vital subject*," *id.* at 274 (emphasis added), and that what must "clearly and unmistakably appear" is "that the city had legislative authority *to make a contract of exemption from the exercise of the power of regulation*," *id.* at 277-278 (emphasis added).

As Glendale contends (Br. 43), the Court in *Home Tel. & Tel.* reaffirmed prior precedents holding that contracts regarding rate regulation were binding on the municipalities that entered into them. Referring to those cases, the Court explained that "[t]he decisions of this court * * * where a contract of this kind was found and enforced, all show *unmistakably* legislative authority to enter into the contract." 211 U.S. at 276 (emphasis added). Each of those cases thus involved, not the general authority "to enter into contracts," but very specific grants of authority to enter into precisely the contracts at issue.[21] Those cases illustrate that specific authority from the legislature is needed before city (or agency) officials commit the legislature by contract to follow certain regulatory policies. No such specific authority was present here.

5. We argue in our opening brief (at 43-46) that the "sovereign acts" doctrine derived from this Court's decision in *Horowitz* v. *United States*, 267 U.S. 458, 461 (1925), precludes respondents' claim for breach-of-contract damages, because the alleged "breach" occurred as a result of Congress's "public and general" decision to restrict or preclude all thrifts from counting intangible

[21] The Court described the two cases cited by Glendale (Br. 43)—*City of Cleveland* v. *Cleveland City Ry. Co.*, 194 U.S. 517 (1907), and *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U.S. 496 (1907)—as, respectively, involving "comprehensive power to contract with street railway companies in respect to the terms and conditions upon which such roads might be constructed, operated, extended and consolidated" and "unrestricted [authority] * * * to provide for the erection and maintenance of a system of waterworks to supply said city with water, and to that end to contract with a party or parties who shall build and operate waterworks." 211 U.S. at 277. See also *id.* at 276 (discussing other cases in which authority to enter into regulatory contracts was found, and which involved, respectively, a "contract [that] was in specific terms ratified and confirmed by the legislature" and a contract made "in obedience to an act of the legislature that the rates should be 'established by agreement between said company and the corporate authorities' ").

assets as capital for purposes of satisfying federal capital requirements.

a. Respondents assert (Winstar Br. 45) that "[t]he operating premise of the sovereign acts doctrine is that, where the federal government is acting in distinct capacities as sovereign and as a contractor, in its role as a contractor it is entitled to be treated as if it were a private contracting party—no better, no worse." They then state (Br. 46) that, "when a contracting party—whether a private party or a government agency—in effect assumes the risk that a change in the law will not occur, and that change does occur so as to impair contract performance, the party that assumed that risk will be liable in damages."

We have no quarrel with those statements of the law regarding the sovereign acts doctrine. See U.S. Br. 43 ("The sovereign acts doctrine is based on a principle of equality between the government and private contractors."). If the contracts at issue here had included provisions in which the government assumed the risk of a change in the governing statutes, the sovereign acts doctrine would not preclude a breach-of-contract remedy when those statutes were amended to render performance impossible. See, *e.g.*, *Amino Brothers Co.* v. *United States*, 372 F.2d 485, 491 (Ct. Cl.) ("The Government cannot make a binding contract that it will not exercise a sovereign power, but it can agree in a contract that if it does so, it will pay the other contracting party the amount by which its costs are increased by the Government's sovereign act."), cert. denied, 389 U.S. 846 (1967). As the original court of appeals panel in this case noted, however, "[a] private party does not necessarily promise that Congress will act only for the benefit of his promisee's interests under the contract." Pet. App. 75a. Under the principle of equality upon which the sovereign acts doctrine rests, the same is true when a federal agency acts in its role as contracting party: the

agency as contractor does not automatically assume the risk that Congress will change the law.

We do disagree with respondents' contention (Winstar Br. 47) that, in the contracts at issue in this case, the government agreed to "assume [the] risk that future regulatory changes would not interfere with the promised regulatory treatment of supervisory goodwill and capital credits." There is no provision in respondents' contracts in which the thrift regulators assumed the risk of a subsequent statutory change like FIRREA. See U.S. Br. 28 ("no unlawful action" clause shifted risk of legal change to respondents). If respondents' theory that the FSLIC contracts implicitly assumed the risk of a subsequent sovereign act of another agency were correct, it would swallow up the sovereign acts doctrine entirely. Under respondents' theory, for example, the contract in *Horowitz* for delivery of silk that one executive agency signed would implicitly assume the risk that in fact occurred—that another agency would impose a railroad embargo making the government's performance impossible. In this case, moreover, the contracting agency—the FSLIC—was in a different branch of the government from Congress, whose passage of FIRREA made performance impossible. See *Atlas Corp.* v. *United States*, 895 F.2d 745, 754 (Fed. Cir.) (holding sovereign acts doctrine applicable where increased cost of contract was the result of statute, despite fact that agency had agreed to adjust price in the event of "unilateral modification [of specifications] by government"), cert. denied, 498 U.S. 811 (1990). None of the Claims Court or Federal Circuit cases cited by respondents, see Winstar Br. 44-45; Glendale Br. 50, involved a similar situation.

b. Respondents argue (Glendale Br. 44-46; Winstar Br. 46) that the sovereign acts doctrine is inconsistent with this Court's decisions in *Lynch* and *Perry* v. *United States*, 294 U.S. 330 (1935). As the Court noted in *POSSE*, however, those cases "held that Congress does not have the power to repudiate its own debts, which constitute

'property' to the lender, simply in order to save money." 477 U.S. at 55. They do not support respondents' argument.

In *Lynch*, the government's repudiation of its war risk insurance contracts was not part of any general program of regulation of the insurance industry, and the *only* individuals affected by the repudiation were those who had contracts with the government. Thus, unlike in *Horowitz*, the government program was not "public and general," and the sovereign acts doctrine could have no application. Indeed, the Court in *Lynch* carefully noted that the insurance policies could not be annulled "unless, indeed, the action taken falls within the federal police power or some other paramount power," 292 U.S. at 579, thereby implicitly distinguishing between mere repudiation of a money debt (as in *Lynch*) and public and general sovereign acts undertaken for the public welfare (as in *Horowitz* and this case).

With respect to *Perry*, respondents rely (Glendale Br. 44; Winstar Br. 46) on the fact that Congress's decision to repudiate the commitments in certain government bonds that they would be repaid in gold was made at the same time as a broader determination that private debts of all kinds may not be paid in gold. Respondents argue from that fact that the attempt unilaterally to alter the terms of the public debt in *Perry* was part of a "public and general" act. However, the regulatory purposes underlying the regulation of private debts—primarily, the need to control the value of money in the economy and set it at a rate higher than would have been permitted by tying it to the value of then-scarce gold, see *Norman* v. *Baltimore & O.R.R.*, 294 U.S. 240, 312-313, 315-316 (1935)—could be accomplished without applying the same measure to alter the terms of existing government debt. Indeed, the purpose of promising repayment of government bonds in gold initially was "to assure one who lent his money to the Government and took its bond that he would not suffer loss through depreciation in the medium

of payment." *Perry*, 294 U.S. at 348-349.[22] To repudiate that promise was "simply in order to save money," *POSSE*, 477 U.S. at 55—an end that has never been recognized as "public and general" under the sovereign acts doctrine.[23]

c. Finally, Glendale argues (Br. 47) that to apply the sovereign acts doctrine in this case would be "to give [FIRREA] a retroactive effect." That contention is incorrect. FIRREA did not impose legal consequences on respondents based on the fact that, at some point in the past, they had counted supervisory goodwill as capital. FIRREA required thrifts to be adequately capitalized in the future. That is the ordinary, prospective operation of a statute, and it raises no retroactivity issues at all.

Moreover, if Glendale's argument were correct, then any recognition of a statute as a "public and general" act that may excuse a breach of contract would be contrary to retroactivity principles, since any such recognition would "retroactively" eliminate a cause of action for breach of contract.[24] In the 130-year history of the

[22] The Court in *Perry* also emphasized that the government bonds in that case were issued under the express constitutional authority "[t]o borrow Money on the credit of the United States," Art. I, § 8, Cl. 2, and supported by the declaration in Section 4 of the Fourteenth Amendment that "[t]he validity of the public debt of the United States, authorized by law, * * * shall not be questioned." See 294 U.S. at 353-354. In light of those provisions, the Court held that the statute, "in so far as it attempted to override the obligation created by the bond in suit, went beyond the congressional power." *Id.* at 354. In this case, there is no doubt that Congress had the authority to alter government policy regarding capital requirements for thrifts.

[23] It should also be noted that the Court determined that the plaintiff in *Perry* had "fail[ed] to show a cause of action for actual damages," see 294 U.S. at 358, in light of Congress's valid action in forbidding the use of gold as legal tender, see generally *id.* at 357-358.

[24] Glendale relies (Br. 45 n.33) on the principle that "a private party cannot claim impossibility based on a supervening law or

sovereign acts doctrine, since the Court of Claims first recognized that a statute could be a sovereign act for purposes of the doctrine, see *Deming* v. *United States*, 1 Ct. Cl. 190, 191 (1865), appeal dismissed, 76 U.S. (9 Wall.) 145 (1870), no court has ever held that statutes may not constitute "public and general" acts that can trigger the doctrine.

* * * * *

For the foregoing reasons, and for the reasons set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

APRIL 1996

decree when its 'own actions created the condition of impossibility.' " However, *all* applications of the sovereign acts doctrine involve cases in which the government—by enacting a statute or taking some other sovereign act—has "created the condition of impossibility" for its own performance. As this Court stated in *Horowitz*, the rationale of the doctrine is precisely that, in such a case, "[t]he two characters which the government possesses as a contractor and as a sovereign cannot be thus fused," 267 U.S. at 461, so long as the sovereign act that has created the impossibility is a "public and general" one.

APPENDIX A

IN THE UNITED STATES CLAIMS COURT

Action No. 90-772 C
(Chief Judge Loren Smith)

GLENDALE FEDERAL BANK, FSB, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

DECLARATION OF PATRICIA LEITNER PURSUANT TO CL. CT. R. 56(G) IN OPPOSITION TO PLAINTIFF GLENDALE'S MOTION FOR SUMMARY JUDGMENT AS TO LIABILITY

I, Patricia Leitner, make the following declaration:

1. I am an attorney employed by the Department of Justice and am counsel of record for the United States in the above-captioned case. I am familiar with the facts and circumstances of this action, and make this declaration pursuant to Rule 56(g) of the Rules of the United States Claims Court in opposition to plaintiffs' motion for summary judgment.

2. The United States has argued in Defendant's Motion to Dismiss that the United States is entitled to dismissal of plaintiff's claims, and in its Response to Plaintiff's Status Report and Opposition to Plaintiff Glendale's Motion for Summary Judgment as to Liability, the United States has argued that summary judgment should not be entered in plaintiff's favor. The issues presented may be resolved without resolution of factual issues. For this

reason, defendant's view has been that discovery is unnecessary and inappropriate in this action. If this Court determines, however, based upon all of the pleadings and papers presently before it, that no material issues of fact exist at this time, and that, on the current record, plaintiff is entitled to summary judgment as to any claim or claims, defendant respectfully submits that a ruling on plaintiff's motion would be premature, as defendant has not had an opportunity to obtain discovery as to certain issues raised in plaintiff's motion for summary judgment.

3. Plaintiff alleges, relying upon documents outside its alleged contracts with the FSLIC, that the alleged contracts include provisions that do not appear on their face and that plaintiff understood and relied upon representations allegedly made respecting goodwill that do not appear on the face of those contracts.

4. Defendant has argued that plaintiff has no such contractual rights and that, in any event, plaintiff has no contractual right that can bind the government from taking any action required by law. Should the Court deem plaintiff's claim cognizable, however, defendant will need discovery to obtain facts to determine what plaintiff understood it had been promised, the basis for this understanding, and what reliance plaintiff placed on any alleged promises it received.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: June 15, 1992

/s/ Patricia Leitner
PATRICIA LEITNER

APPENDIX B

Rule 56 of the Court of Federal Claims Rules provides as follows:

Rule 56. Summary Judgment

(a) For claimant

A party seeking to recover upon a claim or counterclaim, or to obtain a declaratory judgment may, at any time after the expiration of 60 days from the commencement of the action in this court or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in such party's favor upon all or any part thereof.

(b) For defending party

A party against whom a claim or counterclaim is asserted or a declaratory judgment it sought may, at any time, move with or without supporting affidavits for a summary judgment in such party's favor as to all or any part thereof.

(c) Motion and proceedings thereon

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Procedures

The following procedures shall be followed with respect to motions for summary judgment other than in actions seeking review of a decision on the basis of an administrative record:

(1) The moving or cross-moving party shall file, together with its motion, a separate document entitled Proposed Findings of Uncontroverted Fact. This document shall contain concise, separately numbered paragraphs setting forth all of the material facts upon which the party bases its motion and as to which the party believes there is no genuine dispute. Each paragraph shall contain citations to the opposing party's pleadings or to documentary evidence, such as affidavits or exhibits, filed with the motion or otherwise part of the record in the case.

(2) The opposing party shall file, together with its opposition or cross-motion, a separate document entitled Statement of Genuine Issues. This document shall respond by reference to specific paragraph numbers to those proposed findings of uncontroverted fact as to which it claims there is a genuine dispute. The party shall state the precise nature of its disagreement and give its version of the events, supported by record citations. The opposing party may also file proposed findings of uncontroverted fact as to any relevant matters not covered by the moving party's statement.

(3) The parties may dispense with the documents called for in subdivision (d)(1)-(2) of this rule if they file, no later than the time of the initial motion, a comprehensive stipulation of all of the material facts upon which they intend to rely.

In determining any motion for summary judgment, the court will, absent persuasive reason to the contrary, deem the material facts claimed and adequately supported

by the moving party to be established, except to the extent that such material facts are included in the Statement of Genuine Issues and are controverted by affidavit or other written or oral evidence.

(e) Case not fully adjudicated on motion

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(f) Form of affidavits; further testimony; defense required

See Appendix H ¶ 1. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of such party's pleading, but such party's response, by affidavits

or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If such party does not so respond, summary judgment, if appropriate, shall be entered against such party.

(g) When affidavits are unavailable

Should it appear from the affidavits of a party opposing the motion that such party cannot for reasons stated present by affidavit facts essential to justify such party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(h) Affidavits made in bad faith

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1998 405017 40114

(18)

Supreme Court, U.S.
FILED
FEB 27 1996
CLERK

No. 95-865

In The

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

WINSTAR CORPORATION, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

BRIEF OF COAST FEDERAL BANK, FSB, UNION FEDERAL SAVINGS BANK OF INDIANAPOLIS, UNION HOLDING COMPANY, INC., MEADOWS RESOURCES, INC. AND REPUBLIC HOLDING COMPANY, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

DANIEL J. GOLDBERG*
MATTHEW G. ASH

REINHART, BOERNER, VAN DEUREN,
NORRIS & RIESELBACH, P.C.
601 Pennsylvania Ave., N.W.
North Building – Suite 750
Washington, D.C. 20004-2612
(202) 393-3636

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

28 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 4

ARGUMENT 8

NO STATUTORY CHANGE COMPELLED THE BREACH OF THE GOVERNMENT'S CONTRACTUAL OBLIGATIONS CONCERNING REGULATORY CAPITAL CREDITS 8

I. A REGULATORY CAPITAL CREDIT IS NOT A FORM OF GOODWILL 8

II. FEDERAL THRIFT REGULATORS WERE NOT AUTHORIZED BY CONGRESS TO ABROGATE THEIR AGREEMENTS CONCERNING REGULATORY CAPITAL CREDITS 17

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986) 22

Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117 (D.C. Cir. 1983) *cert. denied sub. nom. Union Carbide v. National Resources Defense Counsel, Inc.*, 467 U.S. 1219 (1984) 22

Coast Federal Savings Bank v. Director, OTS, 785 F. Supp. 170 (D.D.C. 1991) 8

Cooke v. United States, 91 U.S. 389 (1875) 22

Jean v. Nelson, 472 U.S. 846 (1985) 20

Louisiana Public Service Comm'n v. FCC, 476 U.S. 355 (1986) 22

NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) 20

Reading Steel Casting Co. v. United States, 268 U.S. 186 (1925) 22

S.R.A., Inc. v. Minnesota, 327 U.S. 558 (1946) 22

Santobello v. New York, 404 U.S. 257 (1971) 22

Security Savings & Loan Ass'n v. Director, OTS, 761 F. Supp. 1277 (S.D. Miss. 1991) 9

Security Savings & Loan Ass'n v. Director, OTS, 960 F.2d 1318 (5th Cir. 1992) 9

Transohio Sav. Bank v. Director, OTS, 967 F.2d 598 (D.C. Cir. 1992) 9

United States v. Corliss Steam-Engine Co., 91 U.S. 321 (1876) 22

TABLE OF AUTHORITIES – Continued

Page

United States v. Mason & Hanger Co., 260 U.S. 323 (1922) 22

United States v. Spearin, 248 U.S. 132 (1918) 22

Winstar Corp. v. United States, 21 Cl. Ct. 112 (1990) ..5, 10

Winstar Corp. v. United States, 64 F.3d 1531 (Fed. Cir. 1995) (in banc) 5, 6, 8, 10, 13

OTHER AUTHORITIES

12 C.F.R. § 3.4 (1994) 21

12 C.F.R. § 563c.14 (1988) 13

12 C.F.R. § 567.1(w) (1995) 17

12 C.F.R. § 567.11(c) (1995) 21

12 C.F.R. § 567.5 (1995) 20

12 C.F.R. Part 3, App. A (1995) 20

Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 415 (Aug. 9, 1989) § 401(h) 19

12 U.S.C. § 1441(a)(b)(10)(C)(i) 19

12 U.S.C. § 1464(t)(1)(C) 18, 20

12 U.S.C. § 1464(t)(2)(C) 18

12 U.S.C. § 1464(t)(9)(A) 18

12 U.S.C. § 1464(t)(9)(C) 18

135 Cong. Rec. S 4093 (daily ed. April 18, 1989) 12

54 Fed. Reg. 46,845 (Nov. 8, 1989) 20

TABLE OF AUTHORITIES – Continued

Page

Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs, 101st Cong., 2d Sess. 24-25 (1990) 12

Hearings Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance, and Urban Affairs, 97th Cong., 2d Sess. 1500 (1982) 11

P. Walgenbach & E. Hanson, *Financial Accounting: An Introduction 6-7* (6th ed. 1990) 10

INTEREST OF *AMICI CURIAE*

Amici entered into contracts with the government to acquire insolvent savings and loans, or "thrifts," from federal thrift regulators that are, in relevant respects, similar to the contract entered into by respondents Statesman Savings Holding Corp., The Statesman Group, Inc., and American Life and Casualty Insurance Company (collectively, "Statesman"). *Amici's* contracts, like those of respondents here, were breached when Congress enacted legislation that abrogated key terms of those contracts.[1] Most importantly for the purposes of this brief, though, the *amici's* contracts, like Statesman's contract, contain the only "express promises" the government appears to acknowledge, Pet. Br. 12, and consider to be "contractual commitments." *Id.* at 34. Those promises concern "regulatory capital credits," a form of consideration from the government distinct in kind and purpose from its promises concerning "supervisory goodwill." Unlike supervisory goodwill, no act of Congress even addressed regulatory capital credits, much less authorized the government's breach of its obligations concerning them. Accordingly, *amici* submit this brief not to reiterate the broader arguments of respondents and other *amici*, but to explain to the Court that even when the government's

---

[1] *Amici* have each sued the United States in the Court of Federal Claims seeking, *inter alia*, money damages for breach of contract and for the uncompensated taking and deprivation of property in violation of the Fifth Amendment. *Coast Federal Bank, FSB v. United States*, No. 92-466C (filed July 9, 1992); *Union Federal Savings Bank of Indianapolis v. United States*, No. 93-671C (filed November 2, 1993); *Republic Savings Bank, FSB v. United States*, No. 92-265C (filed April 13, 1992).

arguments are taken on their own terms – accepting for argument's sake that the government can be immune from contract damages for a breach commanded by Congress – those arguments cannot justify immunity from damages for a breach of the government's express promises concerning regulatory capital credits.

Amicus Coast Federal Bank, FSB ("Coast") in 1987 entered into a contract with the government by which Coast agreed to relieve federal regulators of an insolvent savings and loan, thereby saving the government hundreds of millions of dollars in liquidation costs. As one part of the consideration for Coast's acquisition of the insolvent thrift, the government explicitly agreed, and the contract documents explicitly provided, that Coast would be able to record a $298.3 million government cash contribution as a direct addition to its net worth for regulatory purposes. The government's agreement regarding this regulatory capital credit was an integral premise of the entire transaction.

Amici Union Federal Savings Bank of Indianapolis and Union Holding Company, Inc. ("UHC"), (collectively "Union"), similarly entered into four separate contracts with the government by which they agreed to relieve the federal regulators of four insolvent thrifts, thereby saving the government tens of millions of dollars.[2] Again, as part of the consideration for the transaction the government

---

[2] Union Federal Savings Bank of Frankton ("Union of Frankton") was also a party to those contracts and joined with the two other Union entities in an *amicus* brief in the proceedings in the Court of Appeals. In 1994, Union of Frankton merged into Union Federal Savings Bank of Indianapolis.

explicitly promised, and the contracts explicitly provided, that the resulting institutions would be able to record approximately $53 million in government cash contributions as direct additions to their regulatory net worth. The government's agreements regarding these regulatory capital credits were integral features of the deals.

In 1985 *amici* Republic Holding Company and Meadows Resources, Inc., (collectively "Republic") also entered into a contract with the government to acquire a thrift that was created by the merger of two insolvent institutions. In addition to assuming the liabilities of those institutions, Republic invested $17 million in the new thrift. In return, the government promised, among other consideration, that Republic would be able to record a $3 million government cash contribution to the new thrift as a direct addition to its capital for regulatory purposes. As with the agreements entered by Coast and Union, the government's promise concerning this capital credit was a central component of the Republic acquisition.

The government has repudiated its contractual obligations regarding, *inter alia*, the Coast, Union, and Republic regulatory capital credits, claiming it was required to do so under the provisions of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). Since neither FIRREA nor its legislative history so much as mentions regulatory capital credits, in the proceedings below, and now in this Court, the government has attempted to equate such capital credits with supervisory goodwill, which is addressed by the statute. Statesman contested the government's position, but, because the Court of Federal Claims and the Court of

Appeals concluded that the government was liable for its breach of *all* its contractual promises, neither court ruled on the bargained-for capital credit separately.

Even if the government was correct – and it is not – in its argument to this Court that the government as sovereign is immune from liability in damages when a statute compels the breach of a government contract, such immunity obviously would extend only to a contract breach actually compelled by statute. In the cases before this Court, and in the cases of Coast, Union, and Republic pending in the Court of Federal Claims, this newly-fashioned brand of immunity could cloak *only* the breach of the government's contractual promise concerning supervisory goodwill, which FIRREA addresses, *not* the government's breach of its separate promise concerning a capital credit, which FIRREA does not. Coast, Union, and Republic submit this brief to explain the important distinctions – both in fact and in law – between supervisory goodwill and regulatory capital credits, and so demonstrate that the government's claim of immunity from liability for its breach of its contracts concerning regulatory capital credits is without merit.[3]

INTRODUCTION AND SUMMARY OF ARGUMENT

The issue in the three cases before the Court is whether certain government promises relating to the

[3] Pursuant to Rule 37 of the Rules of this Court, letters from the parties indicating consent to the filing of this brief have been filed with the Clerk of the Court.

accounting treatment for various assets of thrifts – part of the price paid by the Federal Savings and Loan Insurance Corporation ("FSLIC") to induce private parties to acquire insolvent thrifts and so relieve FSLIC of the insurance liability for those thrifts – are contracts requiring, at a minimum, that the federal government pay compensation for their breach. The Court of Federal Claims, *Winstar Corp. v. United States*, 21 Cl. Ct. 112 (1990), and the *in banc* Court of Appeals for the Federal Circuit, *Winstar Corp. v. United States*, 64 F.3d 1531, 1551 (Fed. Cir. 1995) (*in banc*), held that by these promises the government did assume contractual obligations, and that, though the government could exercise its "sovereign prerogative" to renege on the promised accounting treatment via a legislative enactment, that is, FIRREA, the government "remains liable for breach of contract where its legislation is directed at repudiating its prior contractual agreements." *Winstar Corp. v. United States*, 64 F.3d at 1551.

Though the government generally contests the conclusion of the courts below that those promises were in fact made, Pet. Br. at 10-12, 22-36, by the government's lights even if such promises were made, "those promises would be invalid and unenforceable because the thrift regulators who would have made them would not have had the authority to bind future Congresses." *Id.* at 12. Even if the thrift regulators did have such authority, the government continues, it is not liable for contract damages when a breach is caused by a "public and general sovereign act – such as the enactment of FIRREA." *Id.* at 13.

Thus the position the government advances before this Court – that it is entitled to complete immunity for its

breach of the agreements at issue – unmistakably hinges on the claim that Congress made them do it. Though *amici* fully agree with respondents that the Court of Appeals was correct in rejecting the government's arguments, even if it was not, that would not be the end of the matter. As the Court of Appeals pointed out, though the focus of most of the cases before the Court is on the promised treatment of supervisory goodwill, Statesman also presents the distinct promise – as do the contracts of *amici* – that a portion of the FSLIC's cash contribution to the acquired institution "was to be permanently credited to Statesman's regulatory capital (*i.e.*, as a capital credit) for purposes of meeting minimum regulatory capital requirements." *Winstar*, 64 F.3d at 1537.

The significance of these distinct government promises concerning regulatory capital credits – which even the government admits are "express," Pet. Br. at 12, and give rise to "contractual commitments," *id.* at 34 – arises from the fact that, in the Court of Appeals' words, "FIRREA did not specifically cover capital credits or otherwise exclude FSLIC cash contributions from capital for purposes of determining compliance with any of the minimum capital requirements." *Id.* at 1538. If no act of Congress compels the breach of the agreement concerning capital credits, then the government's arguments for its immunity from contract damages, taken on their own terms, simply do not apply to its obligations involving capital credits. Because the Court of Appeals rejected the government's claims to such immunity *in toto*, it did not address the separate circumstances of the promised treatment of FSLIC's cash contribution as a direct credit to capital.

Quite strikingly, the government has not claimed that regulatory capital credits are addressed by FIRREA or were considered by Congress in enacting that statute. Knowing that *goodwill* is addressed by FIRREA, late in the litigation below the government began to characterize these credits as a variant of goodwill, what it calls "Regulatory Accounting Practices (RAP) goodwill." Pet. Br. at 4. Statesman disputed this characterization when it was surfaced by the government, but, again, neither the Court of Federal Claims nor the Court of Appeals ruled on this effort to equate a capital credit with supervisory goodwill in light of their conclusion that the government was liable in damages even when a breach of contract is commanded by an act of Congress.

In fact, a capital credit and supervisory goodwill are fundamentally different accounting conventions representing very different items on the balance sheets of a thrift. Federal thrift regulators themselves have long recognized these differences in their own internal guidelines governing the agreements they would make to dispose of insolvent thrifts and in their instructions to thrifts on how to record these items in their periodic financial reports. The notion that a capital credit is "RAP goodwill" is by and large a convenient invention of the government driven by this litigation.[4]

---

[4] The government similarly introduced the notion of "RAP goodwill" in *amicus* Coast's litigation in the District Court for the District of Columbia. Coast contested this characterization of a capital credit at that time, submitting expert testimony to explain that the capital credit promised to Coast – nearly identical to that promised to Statesman – is not some form of "goodwill." Since the district court dismissed the case on

Similarly, neither capital credits nor "RAP goodwill" is mentioned in FIRREA or its legislative history, as the Court of Appeals pointed out below. *Winstar*, 64 F.3d at 1538. Whatever "sovereign prerogative" the government would like to persuade this Court is at stake in these cases, that prerogative cannot be stretched to include the abrogation of the promise to Statesman concerning its capital credit. At the end of the day, then, the government's breach of its promise that part of FSLIC's cash contribution to the Statesman acquisition could be accounted for as a direct credit to regulatory capital cannot be shielded from liability for damages even if this Court concludes – wrongly, we submit – that the government can breach its promise concerning supervisory goodwill with impunity.

ARGUMENT

NO STATUTORY CHANGE COMPELLED THE BREACH OF THE GOVERNMENT'S CONTRACTUAL OBLIGATIONS CONCERNING REGULATORY CAPITAL CREDITS.

I. A REGULATORY CAPITAL CREDIT IS NOT A FORM OF GOODWILL.

1. While the government makes no effort to directly challenge, much less even acknowledge, the Court of Appeals' recognition of the fundamental differences

jurisdictional grounds, it did not rule on this question. *See Coast Federal Savings Bank v. Director, OTS*, 785 F. Supp. 170 (D.D.C. 1991).

between regulatory capital credits and supervisory goodwill, it does cite two opinions from other Courts of Appeals as authority for the notion that a capital credit is simply another form of goodwill. Neither opinion persuasively supports the government's argument.

In the first, a footnote in a 1992 opinion from the Fifth Circuit, *Security Savings & Loan Ass'n v. Director, OTS*, 960 F.2d 1318, 1320 n.5 (5th Cir. 1992), the Fifth Circuit cited no authority whatever for its assertion that a capital credit constituted "RAP goodwill." The Fifth Circuit's fleeting and naked reference to "RAP goodwill" is further undermined by its failure even to acknowledge that the district court in that case had carefully distinguished its analysis of the government's promise concerning supervisory goodwill from its promise concerning a capital credit. *See Security Savings & Loan Ass'n v. Director, OTS*, 761 F. Supp. 1277, 1279-84 (S.D. Miss. 1991). Indeed, nothing in the record of that case, including the documents memorializing the agreements, even mentioned "RAP goodwill," or in any way equated a capital credit with goodwill. *See, e.g., id.* at 1279 n.3.

The government's second reference, to *Transohio Sav. Bank v. Director, OTS*, 967 F.2d 598 (D.C. Cir. 1992), is even less substantial authority for the government's argument than the Fifth Circuit's footnote. The *Transohio* court did not call a capital credit "RAP goodwill," but simply noted that the capital credit in that case was not to be deducted from the thrift's goodwill account and that goodwill was to be amortized over 25 years. *Id.* at 604. Nothing in *Transohio* makes the leap from a capital credit to goodwill sought by the government.

2. More important to dispensing with this notion of "RAP goodwill" is the fact that a capital credit and supervisory goodwill are fundamentally different accounting conventions describing the results of very different economic events. Indeed, it could accurately be said that the regulatory capital credit is not a generally-recognized accounting convention at all. The difference between the two is reflected in the internal agency guidelines that governed the promises federal regulators could make in negotiating private acquisitions of insolvent thrifts, in the very different language used in the contract documents to memorialize the bargain concerning the capital credit and the bargain concerning supervisory goodwill, and in the distinct instructions the regulators gave to thrifts concerning how to record these items in their quarterly reports.

Goodwill is a familiar concept under generally-accepted accounting principles ("GAAP"), the governing standards for accounting formulated by, among others, the Financial Accounting Standards Board. *See* P. Walgenbach & E. Hanson, *Financial Accounting: An Introduction* 6-7 (6th ed. 1990). Under the "purchase method of accounting" for an acquisition of a business, goodwill is created when the purchaser pays more than the net market value of the business. As explained by the Court of Appeals, "[a]ny excess in the cost of the acquisition (which included liabilities assumed by the acquirer) over the fair market value of the acquired assets was separately recorded on the acquirer's books as 'goodwill.' " *Winstar*, 64 F.3d at 1535-36, quoting *Winstar*, 21 Cl. Ct. at 113. The federal thrift regulators quite consciously

embraced purchase method accounting, a well-established technique under GAAP, to create the supervisory goodwill needed to make these acquisitions work. *See, e.g.*, Federal Home Loan Bank Board Memorandum R 31b, "Accounting For Goodwill In Accordance With GAAP Is Acceptable" (September 1, 1981) (J.A. 571-74). As the Chairman of the Federal Home Loan Bank Board ("FHLBB") explained:

> As a consequence of these new approaches, we have been able to stretch considerably the financial and human resources available to the FSLIC. . . .
>
> . . . .
>
> . . . . In essence, by using mergers as a supervisory tool. . . . , we are seeking to spread as much of the industry's own net worth as possible over the industry's trouble spots as a means of conserving the FSLIC's insurance fund.

Hearings Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance, and Urban Affairs, 97th Cong., 2d Sess. 1500, 1502 (1982) (statement of Richard Pratt, Chairman, FHLBB). Thus, though supervisory goodwill was critical to the viability of these deals as an amortizing asset that served to help fill up the capital "hole" of an insolvent thrift, it was essentially a mathematical artifice that cost federal regulators nothing. Indeed, it was utilized in supervisory transactions arranged by the FHLBB even when the FSLIC provided no financial assistance.

In contrast, a capital credit was a way of accounting for part or all of a *cash* contribution made by the federal regulators to the recapitalization of the insolvent thrift by

crediting that sum directly to an institution's net worth. In the Statesman transaction, $26 million of the regulators' $60 million cash contribution "was to be permanently credited to Statesman's regulatory capital (*i.e.*, as a capital credit) for purposes of meeting [FHLBB's] minimum capital requirements." *Winstar*, 64 F.3d at 1537. In effect, this capital credit represented an equity contribution by the regulators without the creation of a corresponding liability of the thrift in the form of stock.

This accounting treatment, however, did not originate in GAAP; indeed, the concept of a capital credit of this kind appears nowhere in GAAP. Rather, it is one of several accounting practices for thrifts that federal thrift regulators created over the years to further various policy objectives. Though these practices are commonly referred to as "regulatory accounting practices," or "RAP," they include two fundamentally distinct groups of accounting practices.[5] The first group includes practices generally available to all thrifts, codified in the rules of the regulators. An example of this type of RAP was the regulation allowing thrifts to recognize certain losses over a period of time, an accounting practice not allowed under GAAP.

---

[5] The existence of, and need for, accounting practices for thrifts that differ in certain respects from GAAP were recognized in the congressional debates over FIRREA. *See, e.g.*, 135 Cong. Rec. S 4093 (daily ed. April 18, 1989) (star print of Senate Banking Committee report on FIRREA) ("The Committee is aware that in some instances . . . application to thrifts of [GAAP] for banks would have harsh results."). Such differences have continued even after FIRREA. *See, e.g., Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 101st Cong., 2d Sess. 24-25 (1990) (statement of L. William Seidman, Chairman, FDIC).

See 12 C.F.R. § 563c.14 (1988) (superseded). Neither a capital credit like that at issue here, nor "RAP goodwill," appears in these rules.

The second group of RAP, unlike the first, was not generally available to all thrifts. Rather, this group included accounting treatments that were only available to thrifts on an individualized basis through negotiations with the federal regulators that arose in the context of the acquisition of a failed institution. Crediting all or a portion of the regulators' cash assistance directly to the net worth of a thrift was adopted by the regulators early in the 1980s as one non-GAAP benefit that could be offered to spur the acquisition of failed thrifts by healthy institutions.

As the 1980s progressed, the volume of thrift failures increased, as did the number of these acquisitions. To expedite the processing of these transactions, and to diminish staff time in negotiating these deals, the FHLBB, one of the central thrift regulators at the time, issued a memorandum denominating SP-37a to its Principal Supervisory Agents, providing a standard list of non-cash accounting forbearances that the regulators could offer to a healthy institution to induce it to acquire a failed thrift. J.A. 180-206. Reflecting their essential differences, a capital credit and supervisory goodwill are set out as distinct items in SP-37a. Recording the regulators' cash contribution as a direct addition to net worth – a capital credit – is set out as No. SM-1. J.A. 194. A separate item, No. SM-2, allows "unidentified intangible assets" recognized under GAAP (that is, goodwill) to be amortized on a straight-line basis over a period of time significantly longer than

that allowed under GAAP. J.A. 195. Indeed, this amortization of goodwill is itself a common difference between goodwill and a capital credit, since a capital credit ordinarily was a *permanent* addition to capital.

Further reflecting their substantive differences, supervisory goodwill and capital credits often served different purposes in the agreements by which an insolvent thrift was acquired from the regulators. The first problem to be addressed in trying to conclude such a transaction obviously was the deep insolvency of most of these institutions. Capital contributions from the private acquirer and from the regulators, augmented by the accounting device of supervisory goodwill, served to fill the acquired thrift's capital "hole." But uncertain future financial losses, threatened by various problem and/or non-earning assets still on the books of the acquired thrift, posed a separate hurdle to concluding the deal. To deal with this problem, the regulators would often make a continuing commitment of financial assistance to the thrift in the form of a yield maintenance agreement, guaranteeing a certain yield from the thrift's assets to its new owners, and/or in the form of capital loss coverage, by which the regulators agreed to share future losses, in whole or in part, of the thrift with the acquirer.

At the same time, given the growing volume of thrift insolvencies, the regulators increasingly sought to avoid or mitigate such continuing financial exposure in order to obtain a timely and definitive determination of the overall cost of FSLIC financial assistance, and to truly close their books on the institutions they were disposing of by structuring the up-front financial assistance in the deal to induce acquirers to complete the transaction with little or

no continuing involvement of the government. One such inducement was the regulatory capital credit. Simply put, the capital credit was in certain transactions a means by which the thrift regulators, by contract, shifted to the acquirer part or all of the future financial risks of problem or non-earning assets.[6] At the same time, by increasing an acquired thrift's regulatory capital, such a credit gave the institution greater leverage to make loans and investments, and thereby enhance its earning ability to offset the increased risk of future loss the acquirer had assumed. *See* J.A. 537-38.

It is not surprising, then, that the parties to these acquisitions described in their contract documents the bargained-for treatment of supervisory goodwill differently from the capital credit. The Statesman acquisition is a case in point. The treatment of supervisory goodwill, as the simple mathematical result of an accounting method, is memorialized in terms referring to "accounting [for the transaction] . . . in accordance with the purchase method." *E.g.*, FHLBB Res. No. 88-169P (J.A. 439). In contrast, the promised capital credit is not recorded by any words that suggest that it is some kind of goodwill, but in terms drawn almost verbatim from the regulators' RAP memorandum, SP-37a. *See, e.g.*, the FHLBB forbearance letter (J.A. 476) ("It is the FSLIC's intention $21

---

[6] It is ironic that the blow of the regulations implementing FIRREA (but not FIRREA) fell on those institutions who were willing to accept the assistance preferred by FSLIC – the capital credit – while those who elected to receive the back-end assistance not favored by FSLIC – yield maintenance and loan loss coverage – escaped from the FIRREA regulations unscathed.

million of the cash contribution to be made to [Statesman Bank] . . . and the $5 million subordinated debenture are to be a credit to [Statesman Bank's] regulatory capital; therefore, for regulatory accounting purposes, [Statesman Bank] may book such contribution as a direct addition to its regulatory capital.").

Finally, the way the thrift regulators required capital credits and supervisory goodwill to be recorded in various financial reports after an acquisition was consummated further confirms that the regulators understood that these were two very different items. Both before and after the enactment of FIRREA, thrifts were required to file a Thrift Financial Report each quarter. Until the first quarter of 1989, goodwill was required to be reported on a line in the "Assets" section of the Report. *See* Instructions for Thrift Financial Reports, at A-27 (January 1987) (J.A. 202-206). At the same time, "permanent capital contributions by the FSLIC" were to be reported as "Contributed Capital" in the "Regulatory Capital" section of the Report. *See id.* at 203-205. *See, e.g.*, J.A. 491-93, 495-97 (examples of Thrift Financial Reports from Union of Frankton and from *amicus* Coast, respectively, for the last quarter of 1988).

The Thrift Financial Report form was changed by the regulators for the quarter ending in March, 1989. For that and subsequent reports, thrifts were directed to report any capital credit as a memo item footnoted from the capital account. Goodwill was reported as before – that is, as an item completely distinct from a capital credit. *See, e.g.*, J.A. 499-501, 503-505 (examples of Thrift Financial Reports from Union of Frankton and from *amicus* Coast, respectively, for the first quarter of 1989).

Thus, not only is there no support whatever for the government's characterization of Statesman's capital credit as "RAP goodwill," but the regulators' own past behavior contradicts such a notion. As the government itself well knows, a capital credit can no more be equated with goodwill than the event giving rise to the credit – a contribution of *cash* – can be equated with that giving rise to goodwill – a computation of the excess of liabilities over assets.

II. FEDERAL THRIFT REGULATORS WERE NOT AUTHORIZED BY CONGRESS TO ABROGATE THEIR AGREEMENTS CONCERNING REGULATORY CAPITAL CREDITS.

One looks in vain for *any* reference in FIRREA and its legislative history to regulatory capital credits, such as the $26 million credit that the federal regulators expressly promised could be booked as a direct credit to Statesman's net worth. FIRREA simply does not address these credits. To be sure, FIRREA represented a major overhaul of the thrift regulatory regime. But in that overhaul, Congress did not choose to require the exclusion of regulatory capital credits from regulatory capital. In spite of FIRREA's complete silence on the subject, the Office of Thrift Supervision's ("OTS") capital regulation placed all government capital contributions in the category of "qualifying supervisory goodwill," and so required their exclusion from regulatory capital. *See* 12 C.F.R. § 567.1(w) (1990).

As demonstrated above, a regulatory capital credit resulting from the regulators' contribution of cash to a

thrift is not, as a matter of fact, a form of goodwill. And nothing in FIRREA transformed a capital credit, as a matter of law, into a form of goodwill. Nor did FIRREA's reliance on the capital regulations of the Office of the Comptroller of the Currency ("OCC") for national banks justify OTS's classification of government capital contributions as "qualifying supervisory goodwill."

FIRREA authorized OTS to promulgate capital standards for thrifts that "shall be no less stringent than the capital standards applicable to national banks." 12 U.S.C. § 1464(t)(1)(C). The statute specifically required thrifts to maintain core capital at 3 percent of total assets, tangible capital at 1.5 percent of total assets, and risk-based capital at a "not . . . materially lower" amount than that required for national banks, except that OTS may deviate for interest rate or other risks. 12 U.S.C. § 1464(t)(2)(C). FIRREA stated that, "[u]nless the Director prescribes a more stringent definition, the term 'core capital' means core capital as defined by the Comptroller of the Currency for national banks, less any unidentifiable intangible assets. . . . " 12 U.S.C. § 1464(t)(9)(A). Tangible capital means "core capital minus any intangible assets (as intangible assets are defined by [OCC] for national banks)." 12 U.S.C. § 1464(t)(9)(C).

Thus, each of FIRREA's capital standards are based on OCC standards for national banks. In drafting its regulations, OTS apparently took the position that because the OCC's regulations do not expressly *include* regulatory capital credits within core capital, OTS also could not include them as core or, consequently, tangible capital. This is not so. The OCC's capital standards made no reference to direct credits to regulatory net worth

because, as explained above, the regulatory capital credits based on the government's cash contributions were created by the thrift regulators solely for thrifts – not by the OCC for national banks. Therefore, the silence of the OCC regulations cannot be read to require, under FIRREA, the exclusion of the regulators' cash contribution from regulatory capital.

Moreover, nothing in FIRREA can be read as an implicit congressional command that all differences between bank and thrift regulation be ended, regardless of the real differences between the two industries, particularly when such a course would require the government to abrogate its contractual commitments concerning regulatory capital credits.[7] To the contrary, OTS has discretion

---

[7] Indeed, if the text of FIRREA suggests anything, it is Congress' intent that the thrift regulators respect the government's agreements where Congress had not explicitly required their abrogation. Thus, while FIRREA provides that the Resolution Trust Corporation ("RTC") is to exercise all rights to reduce costs under existing FSLIC agreements, it also emphasizes that this provision is not to be construed to grant the RTC new powers to modify contract terms. 12 U.S.C. § 1441a(b)(10)(C)(i). Similarly, FIRREA provides that "orders," "resolutions," and "determinations" of the FSLIC and FHLBB – that is, the very kind of documentation in which the contractual obligation concerning capital credits is expressed – shall continue in force until modified or terminated by some provision of law. Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), § 401(h), Pub. L. No. 101-73, 103 Stat. 415 (Aug. 9, 1989). Moreover, under well-accepted canons of construction, an understanding of FIRREA that follows the text as Congress wrote it – with no change in the treatment of regulatory capital credits – is preferred because it avoids the difficult constitutional questions posed by any competing interpretation of the statute used to justify the

to deviate from the OCC's capital regulations, where, as here, there is "no counterpart" for national banks. Even OTS recognized that because of the differences between national banks and thrifts there can be no perfect marriage between the OCC regulations and its own regulations. For example, OTS added to its definition of core capital certain "nonwithdrawable accounts and pledged deposits of mutual savings associations" (12 C.F.R. § 567.5) (1995) that are not included in the OCC's definition of core (Tier I) capital. *See* 12 C.F.R. Part 3, App. A (1990). OTS characterized this deviation as one of the "primary areas of difference" between the two regulations, which it justified on the basis that the "mutual structure" of many thrifts "has no counterpart in national bank structure." 54 Fed. Reg. 46,845, 46,865 (Nov. 8, 1989). Because there is no counterpart in the regulation of national banks to the thrift regulators' practice of granting by contract regulatory capital credits to induce the acquisition of failed thrifts, including such credits in core capital, as bargained for by the acquirers and promised by the government, would not run afoul of FIRREA's requirement that OTS's core capital standards be no less "stringent" than the OCC's definition. *See* 12 U.S.C. § 1464(t)(1)(C).

Furthermore, the OCC's capital regulation expressly reserves authority to permit national banks, on a case-by-

---

abrogation of vested contract rights concerning the treatment of capital credits. *See Jean v. Nelson*, 472 U.S. 846, 857 (1985) (court must avoid constitutional adjudication where possible); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (statutes must be construed, if feasible, to avoid serious constitutional concerns).

case basis, to include in core capital any type of capital instrument. 12 C.F.R. § 3.4 (1990). OTS promulgated a parallel regulation reserving similar authority. 12 C.F.R. § 567.11(c) (1990). Accordingly, OTS was clearly entitled to invoke this authority to permit the capital credits, not otherwise restricted by FIRREA, to be included in regulatory capital, particularly when doing so fulfilled legitimate contractual obligations of the government. Certainly doing so would not render its regulatory requirement any "less stringent" than that of OCC.

Finally, although FIRREA required the exclusion of at least some "intangible assets" from both core and tangible capital, this provision has no effect on whether the capital credit may be included in regulatory capital. For the capital credit is not an "asset," intangible or otherwise; it is not listed among a thrift's assets on its balance sheet. Instead, prior to FIRREA, a capital credit was *directly* credited to a thrift's net worth.

It is clear, therefore, that OTS' decision to restrict the inclusion of capital credits in regulatory capital was its own, and was not compelled by Congress. As a result, there is no excuse for the failure of the government to honor its contractual commitments concerning capital credits, even under its understanding of the law.[8] For, as

---

[8] Perhaps sensitive to this logic, the government also argues that it made no real contractual commitment to Statesman concerning capital credits because the provision of the Assistance Agreement memorializing this commitment notes that such credits "shall constitute regulatory capital (as defined in § 561.13 of the Insurance Regulations)," which the government claims means that this credit is subject to future

the government conceded in *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986) ("*POSSE*"), when vigorously advancing the contention that the federal government has a right to repudiate its contracts, this alleged right of repudiation "only comes into play, of course, when *legislative* actions modifying contractual obligations are challenged. It obviously does not give executive officials license to repudiate authorized contractual undertakings." Brief of the United States, p.35 n.25, *POSSE* (emphasis in original). *See also Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."). Put simply, if there is no conflict between the government's obligations under its contracts and under the law, it must honor both.[9] Even under the government's reasoning,

---

changes in those regulations. Pet. Br. 34-35. The government can make this argument only by ignoring other provisions of the Statesman agreement, including the FHLBB Resolution that also promised the capital credit but without any reference to other regulatory definitions, J.A. 458, and the Assistance Agreement itself, which provides that the FHLBB Resolution will override any future change in the regulations. J.A. 403. Thus, the contractual commitment of the government concerning capital credits is unmistakable.

[9] *See, e.g., Santobello v. New York*, 404 U.S. 257, 262 (1971); *S.R.A., Inc. v. Minnesota*, 327 U.S. 558, 564 (1946); *Reading Steel Casting Co. v. United States*, 268 U.S. 186, 188 (1925); *United States v. Spearin*, 248 U.S. 132, 138 (1918); *United States v. Mason & Hanger Co.*, 260 U.S. 323, 325-26 (1922); *Cooke v. United States*, 91 U.S. 389, 398 (1875); *United States v. Corliss Steam-Engine Co.*, 91 U.S. 321, 323 (1876); *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117 (D.C. Cir. 1983), *cert. denied sub. nom. Union Carbide v. National Resources Defense Counsel, Inc.*, 467 U.S. 1219 (1984).

then, the government's abrogation of its promises concerning capital credits constitutes a breach of contract for which the government is liable.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Court of Appeals for the Federal Circuit in all respects. If, however, this Court concludes that the government is immune from liability in damages when a statute compels the breach of a government contract, this Court should nevertheless affirm the Court of Appeals to the extent it held the government liable in damages for breach of its contractual promises concerning regulatory capital credits.

Dated: March, 1996

Respectfully submitted,

DANIEL J. GOLDBERG*
MATTHEW G. ASH
REINHART, BOERNER, VAN DEUREN,
NORRIS & RIESELBACH, P.C.
601 Pennsylvania Ave., N.W.
North Building – Suite 750
Washington, D.C. 20004-2612
(202) 393-3636

*Counsel of Record

BEST AVAILABLE COPY

TABLE OF CONTENTS

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. VIEWING GOVERNMENT CONTRACTS AS MERE GAMBLES THAT THE GOVERNMENT WILL NOT RENEGE IS FLATLY AT ODDS WITH THE COURT'S TAKINGS AND DUE PROCESS JURISPRUDENCE, WHICH PROTECTS THE REASONABLE, INVESTMENT-BACKED EXPECTATIONS OF PRIVATE PARTIES EVEN IN THE ABSENCE OF AN EXPRESS PROMISE OR CONTRACTUAL RELATIONSHIP ... 7

II. THE SOVEREIGN ACTS AND UNMISTAKABILITY DOCTRINES ARE IRRELEVANT TO RESPONDENTS' FIFTH AMENDMENT CLAIMS, AS IS THE GOVERNMENT'S ARGUMENT THAT THE AGENCY LACKED CONGRESSIONAL AUTHORIZATION 16

(A) Overview of the Sovereign Acts and Unmistakability Doctrines 16

(B) Inapplicability of the Doctrines to the Fifth Amendment 19

(C) Congressional Authorization of Agency Action 25

CONCLUSION 28

TABLE OF AUTHORITIES

Cases: **Pages**

Allied Structural Steel v. Spannaus, 438 U.S. 234 (1978) 18
Amino Bros. Co. v. United States, 372 F.2d 485 (Ct. Cl.), *cert. denied*, 389 U.S. 846 (1967) 17
Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970) 15
Bennis v. Michigan, 1996 WL 88269 (No. 84-8729, Mar. 4, 1996) 12
Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986) 22-23
Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211 (1986) 20
Correale v. United States, 479 F.2d 944 (1st Cir. 1973) ... 19
Cox v. Louisiana, 379 U.S. 559 (1959) 13-14
Energy Reserves Group, Inc. v. Kansas Power & LightCo., 459 U.S. 400 (1983) 24
Exxon v. Eagerton, 462 U.S. 176 (1983) 18
Federal Crop Ins. Corp. v. Merrill, 332 U.S. 384 (1947) .. 26
First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) 11, 26-27
Fleming v. Nestor, 363 U.S. 603 (1959) 23-24
Geisser v. United States, 513 F.2d 862 (5th Cir. 1975) 27
Heckler v. Community Health Services, 467 U.S. 51 (1984) 14-15
Hercules v. United States, 1996 WL 88267 (No. 94-818, Mar. 4, 1996) 17
Horowitz v. United States, 267 U.S. 458 (1925) 18
Hughes Communications Galaxy, Inc. v. United States, 26 Ct. Cl. 123 (1992) 23
Johnson v. United States, 318 U.S. 189 (1943) 14
Jones v. United States, 1 Ct. Cl. 383 (1865) 18
Kaiser Aetna v. United States, 444 U.S. 164 (1979) .. *passim*

Cases (continued): **Pages**

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 24
Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 20
Lynch v. United States, 292 U.S. 571 (1934) 7
Mabry v. Johnson, 467 U.S. 504 (1984) 12
Manigault v. Springs, 199 U.S. 473 (1905) 16
Miller v. Schoene, 276 U.S. 272 (1928) 12
NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974) 14-15
Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 8
North American Commercial Co. v. United States, 171 U.S. 110 (1898) 16
Omnia Commercial Co. v. United States, 261 U.S. 502 (1923) 19-20
OPM v. Richmond, 496 U.S. 414 (1990) 26
Palermo v. Warden, 545 F.2d 286 (2d Cir. 1976), *cert. denied*, 431 U.S. 911 (1977) 27
Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) 8
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 20
Perry v. United States, 294 U.S. 330 (1935) 7, 19
Raley v. Ohio, 360 U.S. 423 (1959) 13-14
Reeves, Inc. v. Stake, 447 U.S. 429 (1980) 18
Ruchelshaus v. Monsanto Co., 467 U.S. 986 (1984) 11-12, 26
Santobello v. New York, 404 U.S. 257 (1971) ..... *passim*
St. Regis Paper Co. v. United States, 368 U.S. 229 (1961) 15
Stahel v. United States, 78 F. Supp. 800 (Ct. Cl. 1948) . 21-22
Transcapital Financial Corp. v. OTS, 44 F.3d 1023 (D.C. Cir. 1995) 21
Transohio Savings Bank v. OTS, 967 F.2d 598 (D.C. Cir. 1992) 8, 16, 21

Cases (continued): **Pages**

United States v. Cherokee Nation, 480 U.S. 700 (1987) 22-23
United States v. Harvey, 79 F.2d 294 (4th Cir. 1986) .. 12-13
United States v. Pennsylvania Industrial Chem. Corp.,
411 U.S. 655 (1973) 14
United States v. Will, 449 U.S. 200, 222 (1980) 16
Wah Chang Corp. v. United States, 282 F.2d 728
(Ct. Cl. 1960) 22
Winstar Corp. v. United States, 25 Ct. Cl. 541 (1992) 23
Winstar Corp. v. United States,
64 F.3d 1531 (Fed. Cir. 1995) 17
Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) 26

Statutes

Financial Institutions Reform, Recovery, and Enforcement
Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 1

Other Authorities

Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077 (1993) 12

INTEREST OF *AMICI CURIAE*

Amici AmBase Corporation ("AmBase") and Carteret Bancorp, Inc. ("Carteret Bancorp") are banking institutions that entered into agreements with the government that are similar to those at issue in the case being heard by this Court. Like respondents, *amici* have suffered financial losses as the result of the government's failure to fulfill its contractual agreement to permit the continued use of goodwill as regulatory capital. *Amici* have filed a complaint in the United States Court of Federal Claims, No. 93-531C. The facts involved in *amici*'s suit parallel those involved here, and the questions of law at issue in the present case bear directly on the disposition of *amici*'s claims. However, *amici* file this brief not to echo the contract law arguments of respondents, but to remind the Court of the limits that our constitutional jurisprudence -- and particularly the Due Process and Takings Clauses -- places upon the government's power to impose the entire risk of a change in law such as that wrought by FIRREA upon respondents and upon parties similarly situated. In light of its ruling on the contract claims, the Court of Federal Claims and the Federal Circuit did not reach any claim that plaintiffs are entitled to just compensation for a taking of the monies they had invested in the reasonable expectation that they could count supervisory goodwill in calculating regulatory capital, or for the deprivation of that property without due process of law. Only a decision by this Court to uphold the judgment below could obviate the need for the lower courts, and ultimately this Court, to reach those claims.*

Amici's action arises out of the federal government's abrogation of contractual promises made by federal banking agencies directly to *amici* and to their former subsidiary Carteret Savings Bank, FA ("Carteret"), which was seized by federal regulators in December 1992, and the government's destruction

---

* Counsel for all parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk of the Court.

of AmBase's reasonable, investment-backed expectations -- based upon governmental promises and inducements -- in purchasing and infusing additional capital into Carteret. The government's promises were made in connection with Carteret's acquisition of five insolvent thrifts, and also in connection with AmBase's acquisition in 1988 of Carteret and its holding company Carteret Bancorp.

In those transactions the Federal Home Loan Bank Board ("FHLBB") and the Federal Savings and Loan Insurance Corporation ("FSLIC") agreed that Carteret would be permitted to include in the calculation of its regulatory capital the "supervisory goodwill" created in conjunction with the 1982 and 1986 acquisitions of insolvent thrifts, to be amortized over a period of up to forty years. These commitments were critical to Carteret's agreement to acquire (to the government's great fiscal benefit) five failing thrifts with aggregate negative tangible capital in excess of $200 million. The promises by FHLBB and FSLIC, and the expectation thereby induced by the federal government that the specified regulatory capital treatment would be honored throughout the agreed amortization period, were also essential to AmBase's agreement to acquire Carteret (through Carteret Bancorp) in 1988 at a cost of approximately $266 million, and to commit to the government that AmBase would, under certain circumstances, infuse up to $50 million in additional capital into Carteret (which it did), and would guarantee the value of a Carteret subsidiary. In entering into these transactions the government created, and understood it created, investment-backed expectations by Carteret, Carteret Bancorp and AmBase that the promised regulatory capital treatment would remain in effect throughout the period agreed upon. The government's understanding was reflected not only in the numerous representations made by its agents, but also in the fact that it never required Carteret or AmBase to disclose in their Securities and Exchange Commission ("SEC") filings the considerable risk of insolvency that would have existed as a

result of the government's alleged freedom to change the regulatory requirements for treatment of supervisory goodwill without providing any compensation to the thrifts for their lost investment.[1] In reality, neither the government nor AmBase and Carteret perceived any such risk in the acquisition of the failing thrifts -- because the government had assumed financial responsibility for future regulatory changes that would render it unable to perform its contractual obligations.

AmBase, Carteret Bancorp and Carteret fully performed their obligations under the parties' agreements, which saved the government millions of dollars that it would itself otherwise have had to invest to assist the failing thrifts or to facilitate their merger with healthy thrifts. Although FHLBB and FSLIC and their successors received the full benefits of their contractual bargains, *amici*'s contractual and property rights have been completely abrogated and confiscated by the government's conduct, purportedly pursuant to the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. 101-73, 103 Stat. 183 *et seq.* ("FIRREA"). Under FIRREA as interpreted and applied by the government, Carteret could no longer count its supervisory goodwill in regulatory capital, and without this supervisory goodwill could not meet the FIRREA regulatory capital requirements. Because of Carteret's inability to meet the new capital requirements absent the inclusion of supervisory goodwill, federal regulators seized Carteret on December 4, 1992. As a result of the seizure, AmBase has been deprived of its entire cash investment in Carteret of over $328 million, and the government has been enriched by the millions of dollars in capital AmBase infused directly into that institution.

---

[1] Carteret and most of the other banks that acquired failing thrifts during the early 1980s were publicly traded companies that filed annual 10K statements with the SEC, as well as prospectuses. In order to protect public investors, the SEC requires full disclosure of all material facts potentially affecting a company's ability to continue its operations, including the ability to meet regulatory capital requirements.

In their complaint filed in the Court of Claims, *amici* allege that the Government's repudiation and abrogation of its commitments to AmBase, Carteret Bancorp and Carteret -- purportedly pursuant to the policy changes enacted in FIRREA -- constitute a breach of the parties' agreements, a frustration of the purpose of those agreements, and an uncompensated taking of *amici*'s property in violation of the Just Compensation and Due Process Clauses of the Fifth Amendment. *Amici* seek both declaratory relief and a monetary award of damages, restitution, or just compensation.

SUMMARY OF ARGUMENT

Amici adopt the position and arguments of respondents with respect to the breach of contract claims. However, in this brief, *amici* argue that, even if this Court were to conclude that the contracts at issue in this case failed in sufficiently unmistakable terms to shift to the Government the risk of future regulatory change as to the treatment of supervisory goodwill;[2] that the

[2]The Government actually argues that the relevant question is whether the agreements "unmistakably grant[ed] respondents the right, despite future legislative changes, to continue to count goodwill as capital for purposes of meeting federal capital requirements." Pet. Br. at 22. However, as discussed in Point II(A) *infra*, since a future Congress's power to regulate cannot be restricted at all, let alone by "unmistakable" language, through anything short of a constitutional amendment, the proper question is whether the thrift agreements unmistakably *allocate the risk* of regulatory change, and the resulting costs, to the Government, *not* whether the agreements guarantee the thrifts the right to continued use of supervisory goodwill regardless of any intervening changes in the law. Consequently, much of the Government's brief -- which sets out to demonstrate that the agreements did not guarantee the thrifts the right to count supervisory goodwill as capital despite subsequent changes in the law, *see* Pet. Br. at 22-36 -- is simply beside the point, since neither respondents nor *amici* contend that the Government could have granted them such a right.

agencies involved lacked authority to enter the agreements;[3] and that FIRREA constituted a "public and general" sovereign act barring recovery for abrogation of the agreements -- and even if the same reasoning were to compel a like conclusion with respect to *amici*[4] -- such findings would have no bearing on the merits of respondents' or *amici*'s Fifth Amendment claims.[5] This would be so even if it were conceded that the thrifts' property interest for purposes of the Takings and Due Process Clauses arises from the same contractual rights now at issue, because takings and due process jurisprudence protects those who justifiably rely on government promises or representations, whether express or implied, particularly when such reliance takes the form of investment-backed expectations, and especially when the government's promises and representations were intended to induce the very investments that the government later takes or destroys.

In the context of interpreting contracts and resolving federal common-law or statutory claims against the government for

[3] Again, because not even Congress, much less an agency, can bind a future legislature to a certain regulatory course, the government is knocking down a straw man when it argues, *see* Pet. Br. at 38, that the agencies in this case lacked congressional authorization to guarantee the thrifts that capital requirements would not be changed. However, even if the agencies had purported to limit Congress's regulatory authority in this way (which they could not do) or had induced the thrifts' financial investment without congressional authorization, this would not defeat the Fifth Amendment claim of *amici*. *See* Point II(C) *infra*.

[4]Of course, *amici*'s claims of breach might well be stronger than that of respondents, to the extent that the evidence *amici* present at trial establishes that the government agencies unmistakably assumed, vis-a-vis *amici*, the risk of future changes in capital requirements.

[5]In its Reply Brief in support of its Petition for Writ of *Certiorari*, p.11 n.6, the government concedes its "sovereign acts defense 'does not defeat [the thrifts'] claims for a constitutional taking or for frustration of purpose, mistake or other quasi-contractual relief.'"

breach, both the unmistakability and sovereign acts doctrines rest upon a "dual capacity" notion that separates government in its role as contractor from government in its role as sovereign and regulator in order to ensure that the government fares no worse than do private contractors with respect to federal regulatory changes, and in order to avoid unduly penalizing or taxing the government -- and thus the public treasury -- whenever government regulates for the public good in ways that have the incidental effect of frustrating public or private contractual obligations.

By contrast, the Fifth Amendment protects persons whenever the government has induced reasonable expectations and then exercised its sovereign power, whether through "public and general" acts or otherwise, in a way that frustrates those expectations and puts to public use the investment of money or other private property that the government has deliberately induced a party to make. This is so regardless of whether the governmental agency making the underlying commitment in fact has the full and unambiguous legislative authority to do so, or has merely held itself out as having that authority in a manner that reasonably induced the private reliance at issue.

Therefore, this Court should not apply the unmistakability or sovereign acts doctrines, or decide the issue of agency authorization, in a way that would foreclose or in any way limit the separate Fifth Amendment claims of respondents and of *amici*. At the very least, even if this Court were to reverse the determinations of the Court of Claims and Federal Circuit as to the breach of contract issue, it should remand for disposition of the Fifth Amendment issues in this case. But, because it is apparent from even the limited record developed to date that *amici* gave the government a considerable financial benefit in direct response to the government's promises, accepting the government's contract arguments here would needlessly require the lower courts in the first instance, and eventually this Court itself, to rule on *amici*'s due process and just compensation

claims, which would not only survive but should -- for reasons to be developed here -- succeed on the merits.

ARGUMENT

I. VIEWING GOVERNMENT CONTRACTS AS MERE GAMBLES THAT THE GOVERNMENT WILL NOT RENEGE IS FLATLY AT ODDS WITH THIS COURT'S TAKINGS AND DUE PROCESS JURISPRUDENCE, WHICH PROTECTS THE REASONABLE, INVESTMENT-BACKED EXPECTATIONS OF PRIVATE PARTIES EVEN IN THE ABSENCE OF AN EXPRESS PROMISE OR CONTRACTUAL RELATIONSHIP.

Takings and due process doctrine holds that government-induced expectations created through agreements with particular parties are legally protected interests, and that private parties are entitled to be restored to the *status quo ante* -- even if not to specific performance or to contract-based, expectancy damages -- when these expectations are frustrated by the government's failure to keep its promises. It is simply not true that every transaction with the Government amounts to little more than a toss of the dice -- a gamble that the Government will not change the applicable law in ways that render the contract economically senseless. Not only is this position -- that private parties contract with the Government at their own peril -- at odds with well-established government contract doctrine, as exemplified by *Perry v. United States*, 294 U.S. 330 (1935), and *Lynch v. United States*, 292 U.S. 571 (1934), it also runs counter to strong currents in takings and due process jurisprudence which protect even those reasonable, investment-backed expectations that, although government-induced, are not created through an iron-clad, airtight contractual arrangement.

In the takings context, the Supreme Court has held unequivocally that "investment-backed expectations" are the essence of private property rights, *see, e.g., Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978), and that these expectations, when formed under explicit or fairly implied government assurances, merit full constitutional protection. Where the government has induced reasonable, investment-backed expectations in this manner, it must provide just compensation when it defeats those expectations by those subsequent changes in its policy, however constitutional such changes might be on their face, that have the effect of confiscating for the public's benefit the property that the government has induced a private party to invest.[6]

For example, in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the question presented was whether the United States was free, without paying just compensation, to require the owner of a certain Kuapa Pond that had been dredged, converted to a marina, and connected to the navigable waters of the United States, to afford access thereto to members of the public. The Court held that the federal government's creation of a public right of access, through an otherwise constitutional exercise of

---

[6] The fact that private property has been relinquished voluntarily in reliance on a government promise or other inducement does not mean that this property has not been "taken." *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834-37 (1987) (finding a taking where a landowner had voluntarily given up a property right in exchange for development permission). In the present case, the thrifts and their investors gave multi-million-dollar-value consideration to the government in exchange for the government's promises and in reliance on the government's representations regarding the use of supervisory goodwill to meet regulatory capital requirements. That money relieved the federal thrift regulators of having to spend equivalent sums from the U.S. Treasury to accomplish the takeover of failing thrifts. *See Transohio Savings Bank v. OTS*, 967 F.2d 598, 618 (D.C. Cir. 1992) (conceding that the thrift "agencies had no power to compel Transohio to purchase the insolvent thrifts," and that "[b]y absorbing the insolvent thrifts, Transohio gave the agencies something they wanted").

its pervasive power to regulate in navigable waters, was -- absent just compensation -- a taking in violation of the Fifth Amendment. The fact that the government agency, the U.S. Army Corps of Engineers, had awarded a dredging permit and allowed this costly project to go forward to completion before it demanded that free public access be provided, was critical to the Court's judgment. The Court explained:

> We have not the slightest doubt that the Government could have refused to allow such dredging on the ground that it would have impaired navigation [in the adjacent waters], or could have conditioned its approval of the dredging on [the owner's] agreement to comply with various measures that it deemed appropriate for the promotion of navigation. But what [the owners] now have is a body of water that was private property under Hawaiian law, linked to navigable water by a channel dredged by them with the consent of the Government. While the consent of individual officials representing the United States cannot "estop" the United States ..., it can lead to the fruition of a number of expectancies embodied in the concept of "property" -- expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over management of the landowner's property. *Id.* at 179 (citations omitted).

Like the instant case and the other thrift acquisition cases now pending in the federal courts, *Kaiser Aetna* involved an area pervasively regulated by the federal government: under the Commerce Clause, the long-established rule is that all waters connected to a navigable waterway are automatically subject to the navigable servitude of the United States and to the comprehensive regulations adopted by federal authorities. But *un*like the thrift acquisition cases, *Kaiser Aetna* did not involve a specific government promise for which the private party to whom the promise was made had given consideration, and which had induced that party to invest financial resources in a project,

and where the government obtained direct financial benefit from the investment. Indeed, the Supreme Court concluded that promissory "estoppel," in the sense that concept is used in the law of contracts, was neither a necessary nor a sufficient basis on which to hold the government liable for payment of just compensation. Moreover, in *Kaiser Aetna* there was no explicit misrepresentation, only a failure to disabuse a private party of the impression it already held. Yet this implicit misrepresentation was held sufficient to solidify the owner's expectation that it would retain the right to exclude.

Given *Kaiser Aetna*, the theory that contracting with the government involves a necessary risk of noncompensable government violation of its bilateral commitments cannot be squared with Supreme Court takings jurisprudence. If a property owner is protected on the basis of government-induced, investment-backed expectations even where there is no explicit contract, surely it cannot be the case that the property owner is entitled to *less* protection when the government's inducement comes in the form of an express agreement with the government intended to induce the financial investment of the private contracting party as well as of non-parties who will act in foreseeable reliance on the contract.

Consider a parallel to the savings and loan crisis that is the background in this case. The result in *Kaiser Aetna* would have been the same if the government had approached Kaiser Aetna and explained that Kuapa Pond should be developed into a marina to limit the flow of obstructing sediment into nearby navigable waters, but that the Corps of Engineers budget lacked the funds for the Corps to do the job itself, and that the government, in order to induce Aetna to dredge and develop and maintain the pond and thereby simultaneously accomplish the federal government's important public goal, would forbear taking the position that Kuapa Pond was a public navigable waterway and would thereby allow Aetna to develop a private marina to which it could, at its option, deny access or charge

admission fees. Under this scenario, it would be difficult to hold that Kaiser Aetna had gambled that Congress, through a general sovereign act, would not subsequently reach a different conclusion about the wisdom of such a project, and that Kaiser Aetna would therefore have been entitled to no restitution of the enormous assets it had been induced to commit and from which the public and the government had directly benefited, on the theory that the Corps of Engineers had no authority to bind the United States in the face of such subsequent congressional action. Because the Fifth Amendment Due Process and Takings Clauses are self-executing limits on Congress and the Executive alike, *see First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987), there would simply be no way to reconcile *Kaiser Aetna* with such a view of how Congress might freely convert private property to public use.

This Court again stressed the role of the Takings Clause in protecting reasonable, investment-backed expectations in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). That case involved abrogation of Monsanto's governmentally-induced expectations that the trade secret data it submitted to the EPA in the course of seeking registration for a new pesticide would not be disclosed to others. The Court found these expectations "overwhelming," and held that they alone "dispose[] of the taking question." *Id.* at 1005:

> [T]he Federal Government had explicitly guaranteed to Monsanto and other registration applicants an extensive measure of the confidentiality and exclusive use. This explicit governmental guarantee formed the basis of a reasonable investment-backed expectation. If EPA ... were now to disclose trade-secret data ... EPA's actions would frustrate Monsanto's reasonable investment-backed expectations with respect to its control over the use and dissemination of the data it had submitted. *Id.* at 1011.

Thus, denial of reasonable, investment-backed expectations, so

as to devote private property to public use, was sufficient in and of itself in *Monsanto* to establish a taking that required payment of just compensation, and the Tucker Act was available as a remedy.[7]

Prevailing due process doctrine similarly would protect the thrifts, even in the absence of a breach of contract claim. This Court has emphasized on several occasions that the Due Process Clause protects the reasonable expectations of private parties who have relied on government promises or representations made directly to them. Indeed, the Court has held that even convicted criminals have expectation interests that are constitutionally protectable when they are reasonably formed in reliance on the honor of the government in keeping its promises. For example, when a defendant pleads guilty in reliance on a prosecutor's promise to that defendant, the Due Process Clause requires that the prosecutor either fulfill that promise or allow the defendant to withdraw his plea and be restored to the *status quo ante*. *See Santobello v. New York*, 404 U.S. 257, 262-63 (1971); *Mabry v. Johnson*, 467 U.S. 504, 509 (1984); *see also United States v. Harvey*, 79 F.2d 294, 300 (4th Cir. 1986) (holding that broken government promise which induced guilty plea

[7] Although compensation is due under the Takings Clause when property is taken for a public use, as it was in *Kaiser Aetna* and *Monsanto*, compensation is not necessarily due when property is simply *destroyed* for a public purpose, in an exercise of the government's police power. *See, e.g., Bennis v. Michigan*, 1996 WL 88269, at *3-*7 (No. 94-8729, Mar. 4, 1996) (upholding against takings and due process challenges the forfeiture of an automobile under Michigan's statutory abatement scheme); *Miller v. Schoene*, 276 U.S. 272, 279-80 (1928) (no compensation due when government ordered property owners to cut down cedar trees that were contaminating nearby apple orchards). *See generally* Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077 (1993) (discussing the "harm" principle). However, in these cases, the government had not induced the plaintiffs to engage in the very conduct or activity later deemed to be a nuisance. Consequently, unlike respondents and *amici* in the present case, those plaintiffs could not invoke reliance on their reasonable, investment-backed expectations.

implicates due process in part because it undermines "honor of the government [and] public confidence in the fair administration of justice").

Santobello involved the revocation of a plea bargaining agreement. The prosecutor agreed, in exchange for the defendant's pleading guilty to a lesser included offense, to make no sentence recommendation. The defendant entered the plea as agreed. However, at a sentencing several months later, a new prosecutor, unaware of his predecessor's agreement, recommended the maximum sentence. Chief Justice Burger, writing for a unanimous Court, afforded constitutional protection to the personal expectations created in the defendant by his plea bargain with the state. Relying on considerations of equitable estoppel, the Court refused to permit the second prosecutor simply to assume a legal position contrary to the plea bargain negotiated by the original prosecutor. *See* 404 U.S. at 262. Because a criminal defendant who relies on government promises with respect to a plea bargain agreement risks the surrender of constitutional rights, the Court declared that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at 262. The government's duty to fulfill promises made during plea negotiations is so essential that even an inadvertent breach is not a defense. *See id.* at 262-63. Due process principles required the government either to keep its word, or to undo the deal and return the defendant to his original position as a remedy when the government reneged.[8]

[8] The protection of reasonable, government-induced expectations has also surfaced on numerous occasions in the due process doctrine of excusing those who misinterpret the law in reliance on government's representations to them, made to induce them to perform acts sought by the government. *See Raley v. Ohio*, 360 U.S. 423, 438-40 (1959) (barring the prosecution of defendants who had relied on the erroneous advice of a state legislative committee as to their right against self-incrimination); *Cox v. Louisiana*, 379

In *Heckler v. Community Health Services*, 467 U.S. 51 (1984), this Court observed that these takings and due process cases "seem to rest on the premise that when the Government acts in misleading ways, it may not enforce the law if to do so would harm a private party as a result of governmental deception." *Id.* at 61 n.12 (citing, *inter alia*, *Kaiser Aetna v. United States*, 444 U.S. 164, 178-80 (1980), and *Santobello v. New York*, 404 U.S. 257 (1971)). The *Heckler* Court further noted that "[t]his principle also underlies the doctrine that an administrative agency may not apply a new rule retroactively when to do so would unduly intrude upon reasonable reliance interests." *Id.* (citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974)). In *Bell Aerospace*, this Court indicated that it is impermissible for an agency to impose monetary damages or fines on the basis of violation of a standard articulated for the first time in an adjudication, where a private party had relied in good faith on earlier, inconsistent agency decisions under which

---

U.S. 559, 569-71 (1959) (barring the prosecution of defendants who had relied on erroneous instructions from a police chief regarding where protestors could stand outside a courthouse to avoid violating an anti-protesting statute). In *Raley*, the Court addressed the private individual's reasonable expectations, which were protected under the Due Process Clause, by concluding that "[a]fter the Commission, speaking for the State, acted as it did, to sustain the Ohio Supreme Court's judgment would be to sanction an indefensible sort of entrapment by the state -- convicting a citizen for exercising a privilege which the State had clearly told him was available to him." 360 U.S. at 425-26. *See also Johnson v. United States*, 318 U.S. 189 (1943) (holding, long before it was established that prosecutors may not in any event comment on a defendant's failure to take the witness stand, that a prosecutor could not comment on a defendant's invocation of the privilege against self-incrimination when he relied on the judge's erroneous statement that the defendant could invoke the privilege on cross-examination); *United States v. Pennsylvania Industrial Chem. Corp.*, 411 U.S. 655, 674 (1973) (holding that the defendant could not be prosecuted for violating an environmental statute prohibiting the discharge of pollutants into navigable rivers if the defendant had been misled by regulations of the Army Corp of Engineers).

the party's conduct was lawful. *See* 416 U.S. at 295. Under the *Bell Aeorospace* principle, the agency would be barred from enforcing against a particular party a substantive determination, made by an otherwise valid adjudicatory process, because justifiable reliance by that party on *earlier* agency statements taking an opposite view of the matter made it unfair to the particular party simply to enforce the new agency position as though it had always been in place.

In sum, justifiable reliance on government promises or representations, without more, can support recognition of a property right for purposes of both the Due Process Clause and the Just Compensation Clause. As Justice Black once wrote:

> Our Government should not by picayunish haggling over the scope of its promise, permit one of its arms to do that which, by any fair construction, the Government has given its word that no arm will do. It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their government.

St. Regis Paper Co. v. United States, 368 U.S. 208, 229 (1961) (Black, J., dissenting) (quoted with approval in *Heckler v. Community Health Services*, 467 U.S. at 61 n.13). Characterizing the process of contracting with the federal government as a fool's gamble cannot be reconciled with this venerable body of Fifth Amendment jurisprudence. "To say ... 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government." *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970) (quoted in *Heckler v. Community Health Services*, 467 U.S. at 61 n.13). This principle should, of course, be even stronger when there is a formal government contract, as in this and other failing thrift acquisition cases, that is designed to induce and does induce a substantial investment, by both contracting parties and non-parties foreseeably relying on that contract, for the government's benefit.

II. THE SOVEREIGN ACTS AND UNMISTAKABILITY DOCTRINES ARE IRRELEVANT TO RESPONDENTS' FIFTH AMENDMENT CLAIMS, AS IS THE GOVERNMENT'S ARGUMENT THAT THE AGENCY LACKED CONGRESSIONAL AUTHORIZATION.

(A) Overview of the Sovereign Acts and Unmistakability Doctrines. Although the sovereign acts and unmistakability defenses are sometimes discussed separately, they are inextricably linked. Taken together, these doctrines provide that the government will not be held to have assumed the risk of "public and general" sovereign acts that incidentally frustrate its contracts with private parties unless those contracts "unmistakably" so provide.[9] Both the sovereign acts and the

---

[9]The government misleadingly describes the sovereign acts doctrine as an absolute defense to a breach of contract claim whenever "a performance of a contract made by a government agency is rendered impossible by a subsequent federal statute or other action that is a public and general act." Pet. Br. at 44. In fact, the government may still be liable, even when it has acted in its sovereign capacity in a "public and general" way, if it assumed the risk of such intervening changes in law in the contract.

The government also misleads when it states that, under the unmistakability doctrine, "a contractual surrender of a sovereign power for the future should never be found without unmistakable language to that effect." Pet. Br. at 17. Although similar statements of the doctrine appear in other cases, *see, e.g., Transohio Savings Bank v. OTS*, 967 F.2d 598, 618-20 (D.C. Cir. 1992), the fact is that the government's power as a sovereign "cannot be contracted away," no matter how "unmistakable" the language in the contract might be. *See North American Commercial Co. v. United States*, 171 U.S. 110, 137 (1898). The Constitution does permit legislatures to enter into binding contracts and to create vested rights in contract and property that a subsequent legislature cannot impair, but, as the government itself concedes, "[a]t least with respect to the exercise of sovereign regulatory authority, a particular Congress ... cannot take actions that tie the hands of its successors." Pet. Br. at 38. *See also United States v. Will*, 449 U.S. 200, 222 (1980); *Manigault v. Springs*, 199 U.S. 473, 487 (1905).

unmistakability doctrines are hinged upon a conception of the government's "dual capacity" as both a sovereign and a participant in commerce -- a conception which holds that, in order to be effective, the government must ordinarily be free to act in the interests of the general welfare, unhampered by concerns over its contractual responsibilities to particular citizens.

These twin doctrines are thus designed to balance the government's contractual obligations against its obligations to the people it represents -- its duties as sovereign. To strike this balance, courts adopt the fiction that the government, when it enters into agreements, is simply another private contractor, having no more control over or relationship to the government in its role as sovereign than has any other private party. Since private parties, absent an agreement to the contrary, are not liable

---

Consequently, rather than permitting restraints on the government's regulatory power, the unmistakability doctrine at best provides a special rule of interpretation, used in conjunction with the sovereign acts doctrine as applied to contracts between the government and private parties, for determining whether the government has assumed the risk of nonperformance due to its own public and general sovereign acts. *See Amino Bros. Co. v. United States*, 372 F.2d 485, 491 (Ct. Cl.), *cert. denied*, 389 U.S. 846 (1967) ("The Government cannot make a binding contract that it will not exercise a sovereign power, but it can agree in a contract that if it does so, it will pay the other contracting party the amount by which its costs are increased by the sovereign act."); *see also Winstar Corp. v. United States*, 64 F.3d 1531, 1547 (Fed. Cir. 1995) (stating that, although the government could not be enjoined from exercising its sovereign power to change the relevant regulations, the government could be "compelled to pay for the results of its actions" if it had unmistakably assumed responsibility for the consequences of nonperformance due to such change). In a sense, the unmistakability doctrine for allocating the risk of regulatory changes that frustrate government contracts is analogous to the rule requiring clear indications in a contract that the government is waiving its sovereign immunity from suits to which it has not consented. *See Hercules v. United States*, 1996 WL 88267, at *4-*6 (No. 94-818, Mar. 4, 1996) (refusing to infer such a waiver -- and an obligation to indemnify private contractors -- from a provision in a government military contract requiring performance to specifications).

for costs resulting from future changes in law, the government similarly is not liable for sovereign acts that incidentally impair its contracts -- notwithstanding the fact that, in reality, the government (perhaps even the same agency) now abrogates the very contract into which it had entered. *See Horowitz v. United States*, 267 U.S. 458, 458 (1925) ("Though ... sovereign acts performed [by the government] for the general good may work injury to some private contractors, such parties gain nothing by having the United States as their defendants."); *Jones v. United States*, 1 Ct. Cl. 383, 384 (1865) (stating that "the United States ... are to be held liable only within the same limits that any other defendant would be in any other court").[10]

---

[10] As courts have recognized, within the balance between government as market participant entering contracts and government as sovereign protector of the general public, there is a natural tension that, if left unattended, can tip the scales irretrievably against the private citizen. *Cf. Reeves, Inc. v. Stake*, 447 U.S. 429, 436 (1980) (distinguishing between "States as market-participants and States as market regulators"). Because the risk is great that, under the guise of governing, the government might unfairly influence the commercial market to its own advantage, the sovereign acts defense is not without limits, but applies only when the government's legislative or executive acts are "public and general." *See Horowitz v. United States*, 267 U.S. 458, 461 (1925). *Cf. Exxon v. Eagerton*, 462 U.S. 176, 192 (1983) (suggesting that the Court will scrutinize less closely statutes of general application that incidentally operate to impair contracts than statutes that are specifically directed at contract impairment); *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 247 (1978) (striking down under the Contracts Clause a state law "nullif[ying] express terms of the company's contractual obligations" with the state). The danger under the dual capacity principle that the government will abuse its role as sovereign vis-a-vis its contractual obligations should lead this Court to question whether the government can properly be released from the agreements it made with particular thrifts merely because its sovereign acts of public policy -- even though aimed directly at those agreements -- are broader in scope than the simple renunciation of a specific contractual promise. *Amici* agree with respondents that the sovereign acts defense must require a greater level of "generality" than the mere fact that the statute purports to apply to all thrifts equally.

(B) Inapplicability of the Doctrines to the Fifth Amendment. Although the sovereign acts and unmistakability doctrines thus separate government as contractor from government as sovereign, at least where the government's sovereign acts are for the public good and are general in their aim and effect rather than targeted at particular contractual obligations, takings and due process jurisprudence reveals the significant extent to which the law protects reasonable, investment-backed expectations induced by the government, whether by express promise or by a course of conduct, from the effects of even the most public and general of sovereign acts.[11] Indeed, for purposes of the Fifth Amendment, it is the *very fact* that government *both* contracts (or promises) *and* enacts laws or regulations that often *makes* something a taking of private property for a public use, or without due process of law, rather than simply a sovereign act with indirect effects on private contracts. *See Perry v. United States*, 294 U.S. 330, 350-51 (1935) (distinguishing "the power of Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority" from "the power of Congress to alter or repudiate the substance of its own engagements"). Thus, it is apparent that the Fifth Amendment does *not* incorporate the dual capacity notion, discussed above, that treats the government, when it interferes (even through a public and general sovereign act) with performance of its contracts, as essentially a non-contracting party with no special duties or obligations under those contracts.

Compare, for example, those cases in which a party claims a Fifth Amendment violation when an exercise of governmental regulatory power frustrates a purely private agreement, *see, e.g.*, *Omnia Commercial Co. v. United States*, 261 U.S. 502, 513 (1923) (rejecting takings claim in connection with a private

---

[11] As noted earlier, the Government concedes that the sovereign acts doctrine does not defeat a takings claim. *See supra* note 5.

contract because "[f]rustration and appropriation are essentially different things"), with those cases in which a regulation frustrates an understanding *with the government, see, e.g., Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Santobello v. New York*, 404 U.S. 257 (1971). In the former cases of contracts between private parties, the government can typically argue that it was merely making rules or enacting legislation in its sovereign capacity and should not be pecuniarily liable for their harmful consequences. There are many laws and government operations that have an injurious effect on, or even destroy, the value of contracts or other property but that are not considered takings or due process violations, largely because the expectations or investments of the plaintiff that are the basis of the property interest were not created or induced *by the government* to generate a public benefit. In such cases of consequential loss or injury resulting from lawful government action, the law generally affords no remedy unless that loss is severe enough effectively to reduce the property's value to zero. *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016-17 (1992) ("[T]he functional basis for permitting the government, by regulation, to affect property values without compensation -- that 'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law' -- does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial use.") (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). *Cf. Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 ((1986) (in a case not involving a contract with the government, the Court observed that "legislation readjusting rights and burdens" is "not unlawful solely because it upsets otherwise settled expectations," "even though the effect of the legislation is to impose a new duty or liability based on past acts").

In short, in analyzing takings and due process claims arising from the government's alleged failure to abide by its contractual obligations or even by its implied promises, courts have *not* adopted the principle, sometimes said to control mere contract claims, that agreements between the government and a private party should be given no greater status than agreements among private parties, and that there should be a strict separation between government's role as contractor and government's role as regulator. Although a "public and general" sovereign act that diminishes the value of a contract between private parties, or destroys an investment made pursuant to that contract, will only rarely result in a taking of property or a due process violation, such a sovereign act that has the effect of defeating a contract *with the government* may far more readily be held to violate the Fifth Amendment. This is particularly true where, as in the present case, the private parties have given the government the financial benefit it sought in exchange for the representations the government made in that contract. In such circumstances, far from crippling the government's ability to regulate for the public good, requiring just compensation for the private parties' bargained-for investment simply avoids a financial windfall to the government.[12]

Consequently, a finding that an action falls under the sovereign acts doctrine, or that the unmistakability doctrine precludes recovery for breach of contract, would not bar a claim under the Takings and Due Process Clauses of the Fifth Amendment. If it did, these doctrines of contract law would trump the Constitution itself. *See Stahel v. United States*, 78 F. Supp. 800, 804 (Ct. Cl. 1948) ("[T]he taking of property by the sovereign for public use, though unquestionably an act of

---

[12] *Cf. Transcapital Financial Corp. v. OTS*, 44 F.3d 1023, 1025-26 (D.C. Cir. 1995) (observing that the court's earlier analysis in *Transohio Savings Bank v. OTS*, 967 F.2d 598 (D.C. Cir. 1992), which held that plaintiffs could not prevail on the merits of a takings claim for injunctive relief, did not preclude an award of *monetary* relief).

sovereignty, does not, under our Constitution, leave the sovereign immune from having to pay compensation for the taking. The Fifth Amendment expressly imposes liability."); *Wah Chang Corp. v. United States*, 282 F.2d 728, 734-36 (Ct. Cl. 1960) (concluding that the sovereign acts doctrine precluded recovery for breach of contract but finding that the sovereign act at issue nevertheless constituted a compensable taking of plaintiff's property).

It is true that, on occasion, this Court has appeared to invoke the unmistakability doctrine in the context of Fifth Amendment claims. *See, e.g., Bowen v. Public Agencies Opposed to Social Security Entrapment* ("*POSSE*"), 477 U.S. 41 (1986); *United States v. Cherokee Nation*, 480 U.S. 700, 707 (1987). However, a close review of these cases indicates that the Court's disposition of the constitutional claims turned not on its application of the unmistakability rule to determine which party had assumed the risk of regulatory change, but rather on a determination that there was no property interest to protect and thus no Fifth Amendment violation to remedy. In *Posse*, for example, Congress had expressly reserved the right to change any provision of the agreements at issue. The Court concluded that the Government had not created any reasonable expectation in the States that the provision in question would remain unchanged, because the very agreements that were legislatively modified contained no indicia of *contract* rights, but were simply "part of a regulatory program" that Congress by statute had expressly "retained the authority to amend."[13]

---

[13] The *POSSE* Court used several factors in determining that there was no property interest --- such as reasonable, investment-backed expectations -- arising from the agreements with the Government. First, the Court found that the contractual provision at issue "exactly tracked the language of the statute, conferring no right . . . beyond that contained in [the statute] itself." Second, the Court found the provision constituted "neither a debt of the United States, nor an obligation of the United States to provide benefits under a contract for which the obligee paid a monetary premium. Third, the Court found the

Similarly, *Cherokee Nation* involved construction of a treaty pursuant to which the Cherokee Tribe claimed that the federal government had conveyed away its navigational servitude. Noting that such an interpretation of the treaty would be "wholly extraordinary" under well-established law concerning the meaning of the federal servitude, the Court also observed that, in a prior case involving the same treaty, the Tribe had conceded that "nothing in the conveyance of title ... conflicts with the power of the Government [concerning] navigation." 480 U.S. at 706. In these circumstances, far from resolving the case using the unmistakability doctrine, the Court simply held that the Tribe's expectations (and any investments it had made) did not constitute a property right but were unilateral and unreasonable.[14]

As the *POSSE* Court recognized, a mere regulatory program does not confer property rights. *Cf. Fleming v. Nestor*, 363 U.S. 603, 611 (1959) (holding that the Social Security Act confers no

---

"clause was not unique ... nor was it a term over which the State had any bargaining power or for which the State provided independent consideration." Fourth, as noted above, the Court found that the provision "simply was part of a regulatory program over which Congress retained authority to amend in the exercise of its power to provide for the general welfare." Application of these *POSSE* factors to the thrifts' agreements as to the use supervisory goodwill to meet capital requirements -- which conferred a right beyond that contained in the general statutory scheme to which all thrifts were subject, which required thrift acquirors to assume certain liabilities, and which were granted as consideration over which the government had bargaining power -- indicates that the thrifts' investments made in reliance on those agreements constitute property within the protection of the Fifth Amendment.

[14] In some cases involving government contracts with private parties, the government has relied upon the unmistakability and sovereign acts doctrines in defending itself against Fifth Amendment claims. *See, e.g., Winstar Corp. v. United States*, 25 Cl. Ct. 541, 550 n.14 (1992) ("The government also asserts [the sovereign acts] doctrine as a defense to plaintiffs' taking claim."); *Hughes Communications Galaxy, Inc. v. United States*, 26 Cl. Ct. 123, 145 (1992) ("The Government argues that 'the sovereign act defense not only bars breach of contract claims, but also takings claims.'").

vested property interest in benefits which rises to the level of a contractual obligation on the part of the government). The government may enact regulations that readjust economic burdens and benefits in a manner rationally related to a legitimate public purpose, notwithstanding the incidental effects that such regulations have on those who expected the prior scheme to remain in place. *Cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 444 (1982) (dictum) (applying a "rational relation" test to determine the constitutionality of generic changes in the law measuring the duration of causes of action).[15] A critical distinction exists, however, between regulation that affects the value of property held by a private party, and regulation that effects, even if incidentally rather than directly, an abrogation of a contractual right *with the government*. *Cf. Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412-13 (1983) (noting, in the contract impairments context, that "*[u]nless the State itself is a contracting party*, `[a]s is customary in reviewing economic and social regulation, ... courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure,'" but "*[w]hen the State is a party to the contract*, `complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake'") (emphasis added) (citations omitted).

The thrifts in this case cannot and need not rely on a right to have the government enforce regulations as they previously existed. They may, however, rely on specific agreements with or promises made by the government, which induced them to invest considerable sums in failing thrifts -- and which thereby saved the government the amount of that investment. A party to

[15] Given the holding in cases like *Fleming v. Nestor*, *amicf*'s Fifth Amendment claims are strengthened, not weakened, by the fact that the government promises they received came not from some piece of legislation extended generically to all thrifts or financial institutions, but rather through their bilateral dealings with governmental agencies.

such a contract with the government and those who invest in reasonable and foreseeable reliance on that contract have a legitimate expectation that cannot be abrogated by a mere regulatory change, and a regulatory interference with a contract right or even an implied promise can plainly lead to a Fifth Amendment violation, especially where the government received a benefit in exchange for that contract right.

The abrogation of a contractual obligation to refrain from enforcing more stringent capital requirements therefore has constitutional implications that would not exist in the case of a mere regulatory change. The fact that FIRREA and the stringent capital regulations might present mere regulatory changes for savings institutions *generally* does not mean that they are mere regulatory changes when evaluated with respect to each and every savings institution.[16] The violation of constitutional rights is determined by the effect of an action on, and the expectations of, an *individual* party, rather than by the effect on and expectations of all who might be generically affected by changes in law. An action may be a mere regulatory change to a group as a whole, and at the same time amount to a constitutional violation to those individual members of the same group from whom the government, by its targeted commitments, deliberately extracted private property.

(C) Congressional Authorization of Agency Action. The government argues with respect to the contract claims that, even if the agency promised respondents that they could use supervisory goodwill regardless of future legislation restricting them from doing so, this promise would be unenforceable

[16] Again, this fact should also lead the Court to accord special scrutiny to the government's sovereign acts defense, which rests essentially on the contention that by drafting FIRREA in a way that made the law on its face appear to be generally applicable to all thrifts, the government engaged in a "public and general" sovereign act that should release it from contractual liability.

because the agency lacked congressional authorization to make it. *See* Pet. Br. at 42 (citing *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947), and *OPM v. Richmond*, 496 U.S. 414 (1990), cases in which the plaintiffs sought to "estop" the Government from rejecting misrepresentations made by its agents, for the proposition that a party relying on the authority of a government agency "may have his expectations disappointed" and assumes the risk of that the agency is acting outside the bounds of its authority).

Amici certainly do not contend that the relevant agencies had the authority to "contract away" the regulatory power of Congress, since not even Congress could do that. However, even if the agencies had purported to promise exemption from future regulatory changes in capital requirements, or had otherwise attempted to limit Congress's power to change the law, this would have no effect on the resolution of the thrifts' Fifth Amendment claims. This is apparent from the fact that just compensation is required even in those cases where a taking was in fact unauthorized by Congress.[17] *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *id.* at 630 (Douglas, J., concurring) (because the taking of the nation's steel mills would require just compensation, the executive cannot properly effectuate it without congressional authorization); *see also First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (holding that the self-executing nature of the Fifth Amendment requires just compensation once a taking is found, notwithstanding the absence of any voluntary

[17] In determining whether a Tucker Act remedy is available for claims arising out of a taking pursuant to a federal statute, the proper inquiry is not whether Congress authorized the taking or intended to permit recourse to a Tucker Act remedy, but whether Congress has withdrawn the Tucker Act grant of jurisdiction to the Court of Claims. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017 (1984). Thus, the fact that a taking has not been authorized by Congress does not deprive the property owner of the right to recover just compensation.

decision by the sovereign to exercise its power of eminent domain).[18] The thrifts' due process claims would similarly not be defeated by a finding that the agencies involved lacked congressional authorization to make the representations they did to induce the investment in failing thrifts.[19]

[18] In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the Court found a taking of Kaiser Aetna's property (without relying on the concept of promissory estoppel) even though the government officials involved presumably were not authorized to make the representation, inferred by the Court from their silence, that Kaiser Aetna would have no duty to provide public access to its marina. *See* the discussion of this case in Point I *supra*.

[19] *See Palermo v. Warden*, 545 F.2d 286, 296 (2d Cir. 1976) (citing *Santobello v. New York*, 404 U.S. 257 (1971), and concluding that "fundamental fairness and public confidence in government officials require that prosecutors be held to `meticulous standards of both promise and performance'" even where the prosecutor making the promise lacks the authority to bind the particular agency whose action is being compelled) (citation omitted), *cert. denied*, 431 U.S. 911 (1977); *see id.* at 294, 296 n.16 (rejecting the applicability of contract law cases as "resting on totally different policy considerations than those which underlie plea bargaining in the criminal justice system"). *See also Correale v. United States*, 479 F.2d 944 (1st Cir. 1973) (defendant who pleaded guilty on the basis of an "illegal" recommendation -- one the prosecutor was forbidden by statute to offer -- was held entitled to specific performance of the plea bargain); *Geisser v. United States*, 513 F.2d 862, 863-64 (5th Cir. 1975) (in "a case of the great United States going back on its word in a plea bargain made by the Department of Justice," which promised that the defendant would not be deported and that she would not be confined for more than three years, the court rejected as "highly legalistic" the government's "weak justification that notwithstanding breaches of constitutional dimension [*i.e.*, the government's failure to grant the defendant parole and issuance of a warrant for her deportation], there is nothing that can be done about it since (I) the Government by extradition treaty ... is bound to deport [defendant] on demand and (ii) granting release is an unwarranted intrusion into the discretion of the Board [of Paroles] as an independent agency").

CONCLUSION

This Court should affirm the ruling below with respect to respondents' breach of contract claims and thereby avoid the need to confront, after a period of considerable delay, respondents' and *amici*'s meritorious Fifth Amendment due process and just compensation claims. In any event, this Court should not apply the unmistakability or sovereign acts doctrines, or resolve the question of agency authority, in a way that would defeat the separate Fifth Amendment claims of respondents or of *amici* and that would squarely conflict with the protection consistently accorded in takings and due process law to those reasonable expectations that the government induces in specific private parties in order to encourage them to invest resources for public benefit. Thus, even if this Court were to reverse the decision below as to the breach of contract issue, the Court should remand for disposition of the Fifth Amendment issues in this case.

Respectfully submitted.

LAURENCE H. TRIBE
Counsel of Record
BRIAN STUART KOUKOUTCHOS
MELANIE L. OXHORN
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

Of Counsel:

HARVEY SILVERGLATE
ANDREW GOOD
SILVERGLATE & GOOD
83 Atlantic Avenue
Boston, Massachusetts 02110
(617) 523-5933

JOHN C. MILLIAN
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Supreme Court, U.S.
FILED
FEB 28 1996
CLERK

No. 95-865

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Petitioner,

v.

WINSTAR CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

BRIEF OF AMICI CURIAE WATTS HEALTH FOUNDATION, INC. AND BEYOND SHELTER, INC. IN SUPPORT OF RESPONDENTS

PETER J. GREGORA *
KENNETH R. HEITZ
DANIEL P. LEVLER
DELL & MANELLA LLP
1800 Avenue of the Stars
Suite 900
Los Angeles, California 90067
(310) 277-1010
Attorneys for Amici Watts Health Foundation, Inc., Beyond Shelter, Inc.

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

20 pp

TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. BASIC PRINCIPLES	8
II. APPLICATION OF THE "UNMISTAKABILITY DOCTRINE" DOES NOT REQUIRE THIS COURT TO DISREGARD FUNDAMENTAL PRINCIPLES OF CONTRACT INTERPRETATION	9
A. Incorporation by Reference	11
B. The Surrounding Circumstances	12
C. "Dual Promises"	14
III. THE IMPLICATIONS OF THE GOVERNMENT'S *ULTRA VIRES* ARGUMENT	15
IV. IF THE GOVERNMENT PREVAILS UNDER THE SOVEREIGN ACTS DOCTRINE, IT IS LIABLE TO THE PLAINTIFFS FOR RESTITUTION	17
CONCLUSION	19

TABLE OF AUTHORITIES

Cases	Page
Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986)	9
Detroit v. Detroit Citiens' Street Railway Co., 184 U.S. 368 (1902)	14
Horowitz v. United States, 267 U.S. 458 (1925)	17
Lynch v. United States, 292 U.S. 571 (1934)	8
Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982)	9
Murray v. Charleston, 96 U.S. 432 (1878)	15
Perry v. United States, 294 U.S. 330 (1935)	8, 9
Reading Steel Casting Co. v. United States, 268 U.S. 186 (1925)	10
Russell v. Sebastian, 233 U.S. 195 (1914)	10
St. Anna's Asylum, etc. v. City of New Orleans, 105 U.S. 362 (1882)	14
The Sinking Fund Cases, 99 U.S. 700 (1879)	8
United States v. Bekins, 304 U.S. 27 (1938)	9
United States v. Cherokee Nation, 480 U.S. 700 (1987)	9
Winstar Corp. v. United States, 64 F.3d 1531 (Fed. Cir. 1995)	11, 12, 13, 18
Statutes	
12 U.S.C. 1725(c)(3) (1988)	16
38 U.S.C. § 513 (1994)	16
42 U.S.C. § 241(a)(7) (1994)	16
42 U.S.C. § 8144 (1988)	16
Other Authorities	
4 *Williston on Contracts*, § 628 (3d Ed. 1961)	11
6 *Corbin on Contracts* § 1368 (1962)	18
I *Farnsworth on Contracts* § 7.10 (1990)	12
III *Farnsworth on Contracts*, § 12.20 (1990)	17
Restatement (Second) Contracts §§ 272, 371 (American Law Institute 1979)	18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-865

UNITED STATES OF AMERICA,
Petitioner,
v.
WINSTAR CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF OF AMICI CURIAE WATTS HEALTH FOUNDATION, INC. AND BEYOND SHELTER, INC. IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE

Amici curiae, Watts Health Foundation, Inc. ("Watts Health") and Beyond Shelter, Inc. ("Beyond Shelter"), file this brief to emphasize the impact of this case upon the thousands of non-profit corporations who contract with the federal government to provide vital healthcare and social services to the neediest segments of our population. *Amici* are not wealthy financial institutions. Unlike the savings and loan associations who are parties to this case, these non-profit entities lack the financial resources to engage in protracted litigation with the United States over breaches of contract resulting from legislative action. Nonetheless, the very nature of the services *amici* provide subject them to the same risk of loss from contracts terminated by legislative fiat.

Not every federal government contract is put at risk by the positions advanced by Petitioner. However, every contract involving politically sensitive subject matter, whether it be Medicare, welfare, defense spending or an "S&L crisis," can be effectively rendered illusory by Petitioner's arguments. The nature of the services provided by *amici*, make them and the thousands of organizations like them, vulnerable to shifts in the political winds. Of necessity, these organizations must navigate in changing regulatory waters. Petitioner's position, however, would take that regulatory uncertainty to an extreme by giving the government the power to destroy vested contract rights, the benefits of which have already been received by the government, without even recourse to damages whenever a new statute is deemed to be "regulatory."

Amicus Watts Health is a non-profit corporation headquartered in South Central Los Angeles. Watts Health rose from the ashes of the 1965 Watts riots. Its purpose is to provide accessible, quality health care where none is otherwise available. Today Watts Health provides medical and dental services to more than 200,000 people annually. It operates the Watts Health Center, a 60,000 square foot primary care clinic. The center is by far the largest health clinic in South Central Los Angeles and one of the largest community health clinics in the country. Watts Health also operates the United Health Plan, one of five minority owned and operated HMOs in the United States, which provides comprehensive medical care to 90,000 members. Watts Health's fleet of 13 mobile health care units is one of the largest in the nation and provides medical services and inoculation programs to homeless patients and neighborhoods which lack nearby health care facilities. Watts Health also provides adult day care, substance abuse and pre-natal care programs to a disadvantaged patient population.

Watts Health contracts directly with a number of federal agencies such as the Department of Health & Human Services and the Veterans Administration. The contracts

range from master Medicare reimbursement contracts to grant contracts for the development of innovative test programs. While not for durations as long as the S&L assistance agreements to which this case relates, these contracts share the common trait that Watts Health generally has rendered substantial valuable services and consideration to the federal government prior to the receipt of payment. Thus, if as Petitioner urges, a legislative change can excuse government performance without recourse to a damage remedy, the financial consequences to Watts Health could be devastating.

Amicus Beyond Shelter is a much smaller and more narrowly targeted non-profit corporation. Beyond Shelter was founded in 1988 with the goal of filing a critical need in breaking the cycle of homelessness for families: successfully moving homeless families from emergency shelters and transitional housing into permanent housing. Beyond Shelter establishes working relationships with private sector landlords, negotiates leases, and provides case management services to these families for up to one year to help them develop the disciplines needed to become stable tenants. In addition, Beyond Shelter has renovated a slum building into permanent, service-enriched, housing for 41 families and is presently helping develop three other projects which will provide permanent housing for 110 additional families. Beyond Shelter operates a national technical services program to inform and train organizations from other communities in the techniques it has refined over the years. Since its formation, Beyond Shelter has helped over 800 families break the cycle of homelessness. In 1996, the Department of Housing and Urban Development awarded Beyond Shelter one of 25 National Excellence Awards and National Alliance to End Homelessness named Beyond Shelter the Recipient of its 1996 Nonprofit Sector award.

Beyond Shelter contracts directly with the federal government, most frequently the Department of Housing and Urban Development. In addition, it often is awarded

subcontracts from California state agencies or larger non-profits to perform services under master contacts with federal agencies. Beyond Shelter is engaged by these federal agencies to administer homeless assistance programs, to police fraud in such assistance programs and to oversee Section 8 housing benefits. In addition, Beyond Shelter contracts with federal agencies to develop test housing programs for widespread use by many agencies. Beyond Shelter is a small organization with less than 30 employees. When it enters into large, long term federal contracts, it must engage employees and sometimes even lease additional space to perform its obligations effectively. Under the rule urged by Petitioner, any new "regulatory" law relating to the subject matter of Beyond Shelter's long term government contracts would entitle the government to repudiate its contracts without cost—leaving Beyond Shelter with substantial obligations and unneeded space.

The government makes two assertions which undermine the binding effect of government contracts and are of particular concern to *amici*. First, it asserts that contracting parties cannot recover breach of contract damages from the government arising from subsequent legislative action unless the contract expressly contains two talismanic promises: A promise that the policy in question will not be changed and, then, a second promise that the non-government contracting party will be immune from any such change. Petitioner's Brief at 12, 22-23, 26. Second, the government contends that any contract with a federal agency can be annulled by Congress (without compensation) unless the statute delegating contracting authority to that agency authorizes the agency to limit future acion by Congress. Petitioner's Brief at 12-13, 36-37.

The contracts *amici* have entered into with federal agencies do not contain the dual promise language the government now contends is necessary to make federal contracts enforceable. *Amici* seriously doubt whether any of the thousands of contracts routinely entered into for

the provision of health care and social services utilize such language. And, to *amici's* knowledge, no statute delegating contracting authority to any agency with which *amici* contracts permits that agency to limit the future authority of Congress. Accordingly, if the rule urged by the government is adopted by this Court, it will provide the potential to significantly harm contracting parties such as *amici* who fully perform their obligations to the government while creating an undeserved economic windfall to the government.

Amici respectfully urge the Court to affirm the opinion of the Federal Circuit.

SUMMARY OF ARGUMENT

I. Much of the government's argument is premised upon what it calls the "unmistakability doctrine". Asserting that a surrender of sovereign rights will not be found unless such intent "unmistakably appears", the government appears to argue that the normal rules of contract interpretation should be suspended in favor of a result-oriented approach which invariably reaches a conclusion in favor of the government.

Amici take issue with this effort to rewrite long-established principles of contract interpretation. All binding contracts necessarily involve some surrender of sovereignty. The requirement that the surrender of sovereign rights must "unmistakably" appear goes only to the quantum of proof required to establish the parties' intent; it does not modify the basic principles utilized by courts to construe contracts. In the context of parties who contract with the government to provide services in politically volatile areas, such as medicare or welfare, the potential for the government to abuse such result-oriented rules of interpretation is particularly great and particularly unfair.

Amici believe that three contentions made by the government with respect to interpreting the parties' contracts

illustrate how the unprecedented positions taken by the government have the potential to destabilize the fundamental commercial relationship between the government and private contract parties. First, the government's contention that the implementing resolutions were not incorporated by reference into the contracts contradicts the language of the contracts themselves, as well as unquestioned principles of contractual interpretation. Second, the government's contention that it would be rational for plaintiffs to enter into a transaction whereby their future survival depends upon the government's unfettered discretion abandons the ultimate principle of contractual interpretation—common sense. Finally, the government's suggestion that the "unmistakability doctrine " can only be satisfied if the government makes two promises—a promise to provide the consideration, and a second promise not to take it away—is inconsistent with this Court's prior decisions, as well as fundamental principles of contract interpretation.

II. The government's second argument is that the contracts at issue were *ultra vires* because the statute delegating the authority to make contracts to the former Federal Home Loan Bank Board (the "Bank Board") did not expressly state that the Bank Board had the authority to limit the future discretion of Congress. If accepted, this argument would render all federal contracts subject to cost-free Congressional repudiation, since the allegedly required language appears in no federal statute.

III. The government's final argument is premised upon the sovereign acts doctrine. *Amici* join in Respondents' arguments on the merits of this issue. However, we do note that acceptance of this argument would not relieve the government of liability in this case. If the government were to avoid contract liability under the sovereign acts doctrine, it would remain liable for restitution of the benefits which plaintiffs have conferred upon the government.

ARGUMENT

As the issues are presented in Petitioner's Brief, the significance of this case extends far beyond the mere question of whether certain financial institutions are entitled to compensation for Congress' repudiation of their contracts with the Bank Board. The government's arguments call into question the enforceability of virtually every contract entered into by an agency of the United States government.

Invoking "essential attributes of sovereignty" (Petitioner's Brief at 37), the government claims that any contract which is asserted to restrict the future action of the government cannot be so construed (or, if it is so construed, cannot be enforced) unless it satisfies a panoply of rigid requirements—requirements which are seldom, if ever, satisfied by any contract entered into by the government. The consequence of accepting the government's position in this case is to hold that virtually every contract entered into by the United States (excepting only debt obligations)[1] is illusory, and cannot be enforced if the United States government chooses to repudiate it in the wake of subsequent legislative action.

The concerns of *amici* are far from hypothetical. An example from recent headlines is illustrative. Beyond Shelter contracts directly with federal agencies to administer housing assistance programs services which fall within the political rubric of "welfare." There have been proposals in Congress to transfer administration of all welfare programs from federal agencies to the states under block grants. Under Petitioner's theory, such a "regulatory" change would entitle the government to re-

[1] The government acknowledges that its arguments do not apply to "purely financial contractual obligations." Petitioner's Brief at 41. Presumably, this concession is made in recognition of the financial consequences of taking any other position. Even here, however, the government has defined "purely financial" obligations in such a limited fashion that the term may only apply to public debt. See Petitioner's Brief at 41, note 34.

pudiate (without cost) every existing long term contract to provide welfare services that non-profit corporations such as *amici* have entered into directly with federal agencies.

Such a position is troubling to *amici*, who expend millions of dollars every year in reliance upon the contractual commitments of the United States government. It should also be troubling to this Court. If the government's arguments concerning "sovereignty" are correct, then the United States government effectively lacks an essential element of sovereignty—the ability to enter into binding contracts.

In this brief, *amici* will attempt to explain why the government's position is unfounded. Preliminarily, *amici* will briefly discuss certain basic principles applicable to the powers and obligations of the United States government when it enters into contracts. We will then discuss certain of the positions taken by the government and explain why those positions are erroneous.

I. BASIC PRINCIPLES.

It cannot be doubted that the United States government has the power to enter into binding contracts. "When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments." *Perry v. United States*, 294 U.S. 330, 352 (1935). See also, *Lynch v. United States*, 292 U.S. 571, 579 (1934) ("When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."); *The Sinking Fund Cases*, 99 U.S. 700, 719 (1879) ("The United States are as much bound by their contracts as are individuals.")

It is the nature of every governmental contract that it restricts the freedom of the government to do that which the contract prohibits. This voluntarily assumed limitation upon the government's freedom of action does not denigrate from its sovereinty. To the contrary, "[i]t is of the essence of sovereignty to be able to make contracts and give consents bearing upon the exertion of governmental power." *United States v. Bekins*, 304 U.S. 27, 51-52 (1938). See *Perry v. United States*, 294 U.S. at 353 ("[T]he right to make binding obligations is a competence attaching to sovereignty.").

These principles are (or should be) self-evident. Yet, in invoking the talisman of "sovereignty", the government appears to lose sight of the fact that it necessarily surrenders some element of its sovereignty every time it enters into a contract. That is the nature of a binding obligation. Without such a surrender of sovereignty, the government of the United States could not function.

II. APPLICATION OF THE "UNMISTAKABILITY DOCTRINE" DOES NOT REQUIRE THIS COURT TO DISREGARD FUNDAMENTAL PRINCIPLES OF CONTRACT INTERPRETATION.

The government devotes a large portion of its brief to what it chooses to call the "unmistakability doctrine", although that term has never been used by this Court. This supposed "doctrine" is founded upon language in this Court's decisions to the effect that "sovereign power . . . will remain intact unless surrendered in unmistakable terms." *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986) ("*POSSE*") (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982)); *United States v. Cherokee Nation*, 480 U.S. 700, 707 (1987).

This Court's statement is *POSSE* merely reiterates "this Court's often-repeated admonitions that contracts should be construed, if possible, to avoid foreclosing exercise of sovereign authority." *POSSE*, 477 U.S. at 52-53. Dissatisfied with this simple principle, the government has constructed an entire "unmistakability doctrine", complete

with subsidiary principles, nuances and rules of application. According to the government, the "unmistakability doctrine" is "a rule governing contract interpretation" (Petitioner's Brief at 21) which (apparently) trumps all other rules of contract interpretation,[2] and thereby compels the desired conclusion.

Not so. The rules of contract interpretation do not change merely because the United States is one of the contracting parties. *Reading Steel Casting Co. v. United States*, 268 U.S. 186 (1925) ("The contract is to be construed and the rights of the parties are to be determined by the application of the same principles as if the contract were between individuals.") Any requirement that the surrender of sovereignty be "in unmistakable terms"[3] merely goes to the degree of proof required. Such a requirement does not change the long established principles of contract interpretation; nor does it change the requirement that public contracts—even those with presumptions in favor of the government—must be given "a fair and reasonable interpretation." *Russell v. Sebastian*, 233 U.S. 195, 205 (1914).

The extent to which the government has strayed from long established precedents concerning contract interpretation presents a distinct threat to organizations, such as *amici*, which contract in politically volatile subject matters. Inevitably, the government will have more opportunities to trot out these new and aggressive rules of contract interpretation against entities like *amici*. The government's arguments regarding the interpretation of

---

[2] See Petitioner's Brief at 12, where the government refers to "ordinary principles of contract interpretation" and then concludes that its desired result follows *a fortiori* under the "unmistakability doctrine."

[3] *Amici* take no position on whether there is any requirement of "unmistakability" in the present context. Our argument assumes that there is such a requirement.

the Glendale Federal contract[4] demonstrate how far it is willing to extend newly-minted rules of contract interpretation. Under all known rules of contract interpretation, the government is wrong. A few examples suffice to make the point.

A. Incorporation by Reference.

In concluding that the Bank Board's Resolution 81-710 was a part of the Supervisory Action Agreement ("SAA") entered into between Glendale Federal and the Bank Board, the Federal Circuit relied, in part, upon the integration clause in the SAA, which referred to "any resolutions or letters issued contemporaneously herewith" as part of the "agreements and understandings of the parties in connection herewith"—agreements and understandings which were not superseded by the SAA. *Winstar Corp. v. United States*, 64 F.3d 1531, 1540-1541 (Fed. Cir. 1995).

The government strongly disagrees with this conclusion. Although conceding that the SAA "incontrovertibly refers to the Bank Board Resolution" (Petitioner's Brief at 23), it asserts that this fact "does not suggest that the terms of the Bank Board Resolution were transformed by the SAA into contractual commitments of the government." Petitioner's Brief at 24.

The government is simply incorrect. "Where a writing refers to another document, that other document, or so much of it as is referred to, is to be interpreted as part of the writing." 4 *Williston on Contracts*, § 628 (3d Ed. 1961). In this case, however, the language of the SAA was much clearer. It not only referred to the Resolution, it also expressly identified the Resolution as one of the "agreements and understandings of the parties in connec-

---

[4] We will discuss only the interpretation of the Glendale Federal contract because that is both the largest contract and the simplest.

tion herewith."[6] Nothing could be clearer. The parties identified the Resolution as part of the SAA "in unmistakable terms."

B. The Surrounding Circumstances.

The Federal Circuit also relied upon "the circumstances surrounding the transaction" in determining the Glendale Federal's right to amortize supervisory goodwill was a bargained-for element of the contract. Specifically, the Federal Circuit noted that the transaction would be senseless unless the Bank Board had committed to permit supervisory goodwill to be used, since "no healthy thrift would consummate a transaction that immediately put it in regulatory noncompliance." *Winstar*, 64 F.3d at 1542. This consideration of surrounding circumstances is an appropriate method of interpreting the contract. I *Farnsworth on Contracts* § 7.10 (1990) ("The overarching principle of contract interpretation is that the court is free to look to all the relevant circumstances surrounding the transaction.").

The government disagrees, asserting that it was entirely rational for Glendale Federal to wager its very existence on the hope that neither Congress nor the Bank Board would change then-current policy regarding goodwill, because (1) it was reasonable to believe that the Bank

[5] The integration clause of the SAA states:

> "This Agreement . . . constitutes the entire agreement between the parties thereto and supersedes all prior agreements and understandings of the parties in connection herewith, excepting only the Agreement of Merger and any resolutions or letters issued contemporaneously herewith by the [Bank Board] or the FSLIC."

The integration clause only purported to supersede "all prior agreements and understandings of the parties". There can be no explanation for excepting the Resolution from the operation of this clause unless it fell within the general description of the matters which would otherwise be superseded, *i.e.*, the "agreements and understandings of the parties." Thus, the SAA itself clearly identifies the Resolution as representing an agreement between the parties.

Board was unlikely to change its capitalization policies quickly (Petitioner's Brief at 26-27),[6] and (2) there were a "number of immediate benefits" to Glendale Federal which would justify such a risk. *Id.* at 27.[7] Bluntly stated, this assertion defies credulity.

In the real world, it is inconceivable that any healthy profitable institution (which Glendale Federal was) would voluntarily place itself in a position where shifting political winds could cause politicians and politically sensitive bureaucrats to throw it into receivership on a moment's notice. That would be the height of fiscal irresponsibility. In virtually identical circumstances, this Court construed a contract between a city and a street railroad as not permitting the city to unilaterally change the agreed-upon fares:

[6] Th questionable nature of this assertion is demonstrated by the fact that the government reached precisely the opposite conclusion only a few paragraphs earlier. In arguing a different point, the government contended that "in light of the frequency with which federal capital requirements had changed in the past . . . it would have been unreasonable for Glendale, FSLIC or the Bank Board to expect or rely upon the fact that those requirements would remain unchanged." Petitioner's Brief at 26. Thus, within a single page, the government asserts: (1) it would be reasonable for Glendale Federal to gamble its entire existence upon the continuation of the rules regarding supervisory goodwill; and (2) it would be unreasonable for Glendale Federal to expect that those rules would not change. Apparently, the reasonableness of Glendale Federal's expectations changes according to the argument which the government is making at the moment.

[7] Oddly, the principal "immediate benefit" which the government identifies is that acquisitions of insolvent thrifts were "tempting to other [thrifts] attempting to stave off accounting insolvency. . . ." Petitioner's Brief at 27, fn. 20. The peculiar aspect of this supposed "benefit" is that it is completely inapplicable to this case. It is undisputed that Glendale Federal was not "attempting to stave off accounting insolvency"—it was a "profitable thrift, which was in full regulatory compliance." *Winstar*, 64 F.3d at 1536. Thus, the government has been unable to identify any "immediate benefit" to Glendale Federal which would explain why it would be willing to take the risk which the government claims it took.

> It would hardly be credible that capitalists about to invest money in what was then a somewhat uncertain venture while . . . [contracting for the right] to charge a rate then deemed essential for the financial success of the enterprise, would at the same time consent that such rate then agreed upon should be subject to change from time to time by the sole decision of the common council.

Detroit v. Detroit Citizens' Street Railway Co., 184 U.S. 368, 385 (1902).

What was "hardly . . . credible" in the *Detroit Citizens'* case is absolutely incredible here. It defies logic to argue, as the government does, that Glendale Federal could rationally have entered into the SAA without a commitment that it could use supervisory goodwill to satisfy regulatory capital requirements.

C. "Dual Promises."

Throughout its Brief, the government appears to attach significance to the fact that the Bank Board's commitment to permit Glendale Federal to use supervisory goodwill did not say that the commitment could not be revoked in the future. See, *e.g.*, Petitioner's Brief at 12 (contract does not contain promises that "goodwill will continue to be counted"); *Id.* at 23 ("no promises were made that policy would not be changed"); *Id.* at 26 ("Nothing in the language of the Resolution committed the Bank Board or Congress to continue to treat goodwill as an asset for purposes of satisfying federal capital requirements in the future.").

Such an argument has no weight. When a promisor has agreed to provide a benefit, it is unnecessary to require a second agreement that the promisor will not take the benefit away. This Court rejected such a "second promise" argument in *St. Anna's Asylum, etc. v. City of New Orleans*, 105 U.S. 362 (1882). In response to the City's argument that the contractual grant of a tax exemption could be withdrawn because the contract did not expressly provide that it could not, this Court stated: "The addition of a declaration, that the exemption given should not be withdrawn, would not have added to its force." *Id.* at 369. See also *Murray v. Charleston*, 96 U.S. 432, 445 (1878) ("A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity.")

In this case, the government promised that certain thrifts would be permitted to use supervisory goodwill. This promise did not become any less binding because the contract failed to say "and we really mean it."

III. THE IMPLICATIONS OF THE GOVERNMENT'S *ULTRA VIRES* ARGUMENT.

The government also advances the argument that any agreements made by the Bank Board to permit institutions to use supervisory goodwill would be *ultra vires* because Congress did not expressly delegate to the Bank Board the authority to bind future Congresses not to change the rules. Petitioner's Brief at 36-43. Other than to join in Respondents' arguments, *amici* will not comment on the substance of this argument. However, this Court should seriously consider the full implications of the government's position.

The government appears to argue that Congressional abrogation of a contract between an agency and a private citizen could only give rise to contractual liability if Congress had expressly granted the agency the power to limit the future authority of Congress. Petitioner's Brief at 12-13, 36-37, 39. To the knowledge of *amici*, no statute of the United States has ever contained such a provision. Certainly, the government has not cited any such statute. This is of serious concern to *amici* because there is no discernible difference between the statute that authorized the thrift regulators to enter into contracts with Respondents, and the various statutes that authorize officials from the Department of Health and Human Services, the De-

partment of Housing and Urban Development, and the Veterans Administration to enter into contracts with organizations like *amici*.[8]

The implications of the government's position are therefore quite serious. The government is here saying that abrogation of agency contracts by Congress can never result in liability to the United States. Thus, if Congress wishes to materially change policy in a particular area, it can simply nullify all contracts implementing the prior policy and pass off a material portion of the costs of the policy change upon innocent private parties who had the misfortune to contract with the government at the wrong time. In effect, the government would have partially funded its policy change with an arbitrary "tax" consisting of the losses imposed upon private parties by the government's cost-free repudiation of its contracts.[9]

The government's position is of serious concern to *amici*, who contract with the government in such politi-

[8] The contract authorization provisions of the statutes which apply to medical and social service virtually mirror the statutes at issue in this case. *Compare* 12 U.S.C. § 1725(c)(3) (1988) (repealed) (FSLIC "shall have the power . . . to make contracts") with 42 U.S.C. § 241(a)(7) (1994) ("[T]he Secretary [of Health and Human Services] is authorized to . . . enter into contracts"); 42 U.S.C. § 8144 (1988) ("The Secretary [of Housing and Urban Development] is authorized to . . . enter into contracts"); 38 U.S.C. § 513 (1994) ("The Secretary [of the Veterans Admniistration] may . . . enter into contracts or agreements with private or public agencies or persons").

[9] The government frankly admits that this is its intention, when it argues against "a governmental obligation to pay substantial damages as the price for exercising regulatory authority. . . ." Petitioner's Brief at 21. Characteristically, the government has considered only its own interests. What the government fails to acknowledge is that somebody must bear the loss when the government repudiates its contract with a private party; if the government does not pay compensation, then the private party suffers losses by reason of the government's refusal to perform. The government never identifies any reason why the costs of the government's change in policy should arbitrarily be borne by private parties whose only offense was that they were naive enough to believe that a contract meant something.

cally sensitive areas as health care and shelter for the homeless. An abrupt change in government policy in these areas is always a possibility. If the government can freely (and without cost) repudiate all contracts entered into under the prior policy, *amici* and many other non-profit corporations may suffer severe losses.

IV. IF THE GOVERNMENT PREVAILS UNDER THE SOVEREIGN ACTS DOCTRINE, IT IS LIABLE TO THE PLAINTIFFS FOR RESTITUTION.

The government's third argument to this Court is that the sovereign acts doctrine excuses it from performance of its obligations to the plaintiffs in this case. *Amici* join in the arguments advanced by Respondents on the merits of this contention. However, we believe it is also important to note that application of the sovereign acts doctrine only relieves the government from liability for contract damages and not from liability for restitution.[10]

The sovereign acts doctrine separates the government's status as sovereign from its status as contracting party. If, in its capacity as sovereign, the government passes a law of general application which prevents performance under a contract, the government, as contracting party, may use the existence of such law as a defense to contract liability to the same extent as it could if it were not the sovereign. *Horowitz v. United States*, 267 U.S. 458 (1925).

The government correctly notes that the sovereign acts doctrine, if applicable, would permit it to assert the defenses of impossibility or supervening illegality and thereby avoid liability for breach of contract. Petitioner's Brief at 43-44. However, that defense to contractual liability would not defeat the government's liability to

[10] Under some circumstances, restitution may also be used as a remedy for breach of contract. III *Farnsworth on Contracts* §§ 12.20 (1990).

Respondents in this case. The government would remain liable to Respondents for restitution of the benefits they conferred upon the government.

This basic principle was stated by Professor Corbin as follows:

> Even though such a kind and degree of impossibility exists as to discharge a defendant from further legal duty, the law does not permit him to retain the benefits of a performance rendered by the plaintiff.
>
> * * * * *
>
> In cases like these, the plaintiff can not get specific performance and has no remedy in damages. He loses, without recourse, the benefits and profits of the bargain; but he has a right to the restoration of whatever the defendant may have received from him under the contract.

6 *Corbin on Contracts* § 1368 (1962). To similar effect: *Restatement (Second) Contracts* §§ 272, 371 (American Law Institute 1979).

In the Glendale Federal case, for example, Glendale Federal conferred a benefit upon the government of three quarters of a billion dollars when it merged with an insolvent thrift and assumed liabilities which would otherwise have been paid by the government. *Winstar*, 64 F.3d at 1536. That assumption of liabilities occurred pursuant to the contract which the government now seeks to avoid under the sovereign acts doctrine. If the government is successful in avoiding liability under the contract, it is not entitled to keep the monetary benefit it received under the unenforceable contract; it must refund that money to Glendale Federal.

CONCLUSION

For the reasons stated, the judgment below should be affirmed.

Respectfully submitted,

PETER J. GREGORA *
KENNETH R. HEITZ
DANIEL P. LEFLER
IRELL & MANELLA LLP
1800 Avenue of the Stars
Suite 900
Los Angeles, California 90067
(310) 277-1010
Attorneys for Amici Watts Health Foundation, Inc., Beyond Shelter, Inc.

* Counsel of Record

Supreme Court, U.S.
FILED
MAR 29 1996
CLERK

No. 95-865

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Petitioner,

v.

WINSTAR CORPORATION, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

BRIEF FOR AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC., ELECTRONIC INDUSTRIES ASSOCIATION, NATIONAL SECURITY INDUSTRIAL ASSOCIATION, AND SHIPBUILDERS COUNCIL OF AMERICA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

OF COUNSEL:

PROFESSOR JOHN CIBINIC, JR.
George Washington University
Law School
Washington, D.C. 20052

KATHLEEN A. BUCK
Kirkland & Ellis
Washington, D.C. 20005

MAC S. DUNAWAY
GARY E. CROSS
Dunaway & Cross
Washington, D.C. 20036

CLARENCE T. KIPPS, JR.
Counsel of Record
ALAN I. HOROWITZ
KEVIN C. DWYER
MILLER & CHEVALIER,
Chartered
Metropolitan Square
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 626-5800

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE UNMISTAKABILITY RULE IS NOT APPLICABLE TO THIS CASE 5

A. The Unmistakability Principle Comes Into Play When A Party Contends That The Government Has By Implication Surrendered A Sovereign Power, But It Does Not Displace Ordinary Interpretive Principles For Every Government Contract That Imposes Some Constraint On Government Action 7

B. The Unmistakability Rule is Inapplicable In A Suit For Breach Of Contract Damages 17

II. THE SOVEREIGN ACT DEFENSE DOES NOT EXCUSE THE GOVERNMENT FROM BREACH OF CONTRACT LIABILITY 21

CONCLUSION 27

TABLE OF AUTHORITIES

Cases: Page

Bowen v. Public Agencies Opposed to Social Security Entrapment (POSSE), 477 U.S. 41 (1986) 11, 12, 13, 19, 20

Cooke v. United States, 91 U.S. 389 (1875) 22

D & L Constr. Co. v. United States, 402 F.2d 990 (Ct. Cl. 1968) 25

Deming v. United States, 1 Ct. Cl. 190 (1865) 21

Everett Plywood Corp. v. United States, 651 F.2d 723 (Ct. Cl. 1981) 23

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) 19

Freedman v. United States, 320 F.2d 359 (Ct. Cl. 1963) 25

Gerhard F. Meyne Co. v. United States, 76 F. Supp. 811 (Ct. Cl. 1948) 25

Hills Materials Co. v. Rice, 982 F.2d 514 (Fed. Cir. 1992) 25

Page

Home Tel. & Tel. Co. v. City of Los Angeles, 211 U.S. 265 (1908) 9

Horowitz v. United States, 267 U.S. 458 (1925) 4, 21, 22, 25

Hughes Communications Galaxy, Inc. v. United States, 998 F.2d 953 (1993) 5, 14-15, 26

Jefferson Branch Bank v. Skelly, 66 U.S. (1 Black) 436 (1862) 9, 19

Jones v. United States, 1 Ct. Cl. 383 (1865) 21, 22

Lynch v. United States, 292 U.S. 571 ..... 6-7, 16

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 11, 13, 14

Miller v. United States, 140 F. Supp. 789 (Ct. Cl. 1956) 23

Montana v. United States, 450 U.S. 544 (1981) 14

Murray v. Charleston, 96 U.S. 432 (1878) 4, 16, 17

O'Neill v. United States, 231 Ct. Cl. 823 (1982) 21, 22

Perry v. United States, 294 U.S. 330 (1935) 22

TABLE OF AUTHORITIES -- Continued

Page

Piqua Branch v. Knoop, 57 U.S. (16 How.) 369 (1853) 10, 16

Preseault v. ICC, 494 U.S. 1 (1990) 19

Providence Bank v. Billings, 29 U.S. (4 Pet.) 514 (1830) 8, 16

Sinking Fund Cases, 99 U.S. 700 (1879) 22

St. Louis v. United Rys. Co., 210 U.S. 266 (1908) 8

Sun Oil Co. v. United States, 572 F.2d 786 (Ct. Cl. 1978) 22, 23

Sunswick v. United States, 75 F. Supp. 221 (Ct. Cl. 1948) 25

The Delaware R.R. Tax, 85 U.S. (18 Wall.) 206 (1873) 9, 10

United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) 16

United States v. Bostwick, 95 U.S. 53 (1876) 5, 24, 25

United States v. Cherokee Nation, 480 U.S. 700 (1987) 13, 14, 18

TABLE OF AUTHORITIES -- Continued

Page

Vicksburg, S. & P.R. Co. v. Dennis, 116 U.S. 665 (1886) 8-9

W.B. Worthen Co. v. Kavanaugh, 295 U.S. 56 (1935) 16

Statutes:

12 U.S.C. §§ 1464(t)(3)(A) and (9)(B) 23

12 U.S.C. (1986 ed.) §§ 1730(t)(2), 1729(f)(2)(A) 10

28 U.S.C. § 1491(a)(1) 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-865

UNITED STATES OF AMERICA,
Petitioner,

v.

WINSTAR CORPORATION, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF FOR AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC., ELECTRONIC INDUSTRIES ASSOCIATION, NATIONAL SECURITY INDUSTRIAL ASSOCIATION, AND SHIPBUILDERS COUNCIL OF AMERICA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICI CURIAE

The Aerospace Industries Association of America, Inc. (AIA) represents the nation's manufacturers of aerospace equipment, including aircraft, missiles, spacecraft, and related components. The Electronic Industries Association (EIA) is a national organization of more than 1200 companies

involved in the development and production of televisions, radios, computers, telecommunications devices, radars, avionics, and other military and commercial electronic equipment. The National Security Industrial Association (NSIA) is a national organization of more than 300 manufacturing, research, and service companies from all segments of industry that provide goods and services in support of the national security needs of the United States. The Shipbuilders Council of America is a voluntary, nonprofit trade association founded in 1920 to promote a sound private shipbuilding and ship-repair industry in the United States; to promote an adequate mobilization potential of privately owned shipbuilding, ship repair, and allied industry for availability during national emergencies; and to afford a means of cooperation between government and industry on matters of national concern.

The members of these associations have thousands of contracts, worth billions of dollars, to provide goods and services to the United States, and many of them derive a substantial portion of their revenues from such contracts. The integrity of those government contracts will be undermined if the government's expansive arguments concerning the "unmistakability" and "sovereign act" principles are accepted by this Court. Accordingly, these organizations have a strong interest in this case, and we believe the Court would benefit from their views.

Both petitioner and respondents have consented to the filing of this brief, and letters reflecting those consents have been lodged with the Clerk of this Court.

SUMMARY OF ARGUMENT

I. A. 1. This Court has never advanced the "unmistakability" principle as a broadly applicable rule for interpretation of government contracts. Rather, it operates in a limited setting as a kind of maxim that helps determine the intent of the contracting parties. The Court will not lightly find in a government contract an implied waiver of the government's essential sovereign powers, like the power to tax. Because the government would not ordinarily be expected to contract away such critical authority, this Court has consistently stated that it will not find such a contractual surrender unless it is expressed in unmistakable terms.

This case is far removed from the Court's precedents on this point, and the government's invocation of the unmistakability rule here stretches it well beyond its recognized bounds and the limits of its rationale. A prophylactic interpretive rule that reflects the Court's reluctance to find a waiver of the sovereign power to tax should not be extended to the ordinary government contract, where there is no reason to doubt that, as part of the bargain, the government intended to make an enforceable promise regarding its future actions. No decision of this Court suggests that the reach of unmistakability is so broad, and its use should be restricted to the setting in which it has previously been applied -- namely, where parties claim a waiver of a sovereign power that is essential to an independent government.

2. Moreover, this case differs from the line of unmistakability cases in another important respect. In the precedents on which the government relies, the plaintiffs argued for an implied limitation on the taxation power based

on contracts that did not address taxation at all. Here, however, the government action revokes a promise that was at the heart of the bargain of the parties. A conclusion that the government retained the power to breach its obligation through subsequent government action would render the explicit contractual promise a nullity; the unmistakability rule does not call for such an untoward result. *See, e.g., Murray v. Charleston*, 96 U.S. 432, 445 (1878).

B. The unmistakability rule does not apply where a party seeks only damages, but does not seek to prevent the government from exercising its powers. The latter situation raises jurisprudential issues that warrant protection against a contract interpretation that could hamstring the ability to govern. Merely holding the government financially responsible for breach of contract, however, does not raise those issues. The distinction between restraining the government and holding it liable for damages is embodied in the Fifth Amendment, and it is equally appropriate in connection with the unmistakability rule. No court has ever invoked the rule in order to reject a claim for breach of contract damages, and this Court should not depart from that history here.

II. A. The "sovereign act defense" does not preclude damages liability in this case. That defense is not designed to confer any special immunity on the government that would not be available to a similarly situated private contractor. The defense applies only when a "public and general" governmental act prevents performance. *Horowitz v. United States*, 267 U.S. 458, 461 (1925). Here, the legislative changes addressed to supervisory goodwill were targeted at the contract rights created in the thrift mergers, and therefore the sovereign act doctrine does not apply.

B. In accordance with the principle of *United States v. Bostwick*, 94 U.S. 53, 68-69 (1877), the Federal Circuit has correctly ruled that a direct government promise in the contract may demonstrate assumption of financial responsibility for sovereign acts that interfere with contractual obligations. In particular, when the government promises to abide by a specific regulation or policy, the sovereign act doctrine does not excuse the government from paying damages if a change in that policy causes a breach. *See, e.g., Hughes Communications Galaxy, Inc. v. United States*, 998 F.2d 953, 958-59 & n.8 (Fed. Cir. 1993). That principle is applicable here where the government promised to perform in accordance with specified policies, and it is fatal to invocation of the sovereign act defense.

ARGUMENT

I. THE UNMISTAKABILITY RULE IS NOT APPLICABLE TO THIS CASE

The "unmistakability" language in this Court's prior decisions does not establish a broadly applicable rule for interpreting government contracts. That language was developed in cases where private parties contended that the government had impliedly contracted away its right to exercise the sovereign power to tax, even though the contracts were silent on the subject. The unmistakability language reflects the Court's view that a waiver of the tax power will not lightly be implied, but must be evidenced by contract language manifesting the government's intent to cede that power. To the extent the "unmistakability" principle can be called a rule of contract interpretation, it applies only where a party asserts that the government has contracted

away, surrendered, or waived a sovereign power akin to taxation. That is not the case here.

The government argues, however, that the "unmistakability" rule is broader and forecloses the Federal Circuit's conclusion that respondents are entitled to damages from the government for breach of contract. Specifically, it argues that, as a matter of law, a government's "exercise [of] sovereign regulatory authority" (Br. 11) cannot breach a contract unless the contract provides in unmistakable terms that the rights it confers are not to be affected by subsequent government action. This argument expands the effect of the Court's unmistakability language beyond recognition.

The government impermissibly seeks to alter the role of the unmistakability principle and to extend its area of applicability. The government maintains that the rule is not merely a limited aid to contract interpretation, but rather a dispositive doctrine (in favor of the government) that trumps any other evidence of the intent of the contracting parties. And the government would extend the rule beyond its limited setting to apply to every ordinary government contract.

This proposed expansion of the unmistakability rule would unfairly and unwisely ruin a private contractor's ability to rely upon the government's commitments. As the Court of Federal Claims stated below, if the government's promises in routine contracts are subject to being voided later by unilateral government action, it "would make all dealings with the government a very elaborate and expensive form of gambling." Pet. App. 167a. The resulting uncertainty would be harmful not only to private parties, but also to the government's contracting ability. As Justice Brandeis wrote for this Court in *Lynch v. United States*, 292 U.S. 571, 580

(1934): "Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors." Contractors would become more wary of contracting with the government and, at a minimum, would justifiably require higher prices to compensate them for bearing the additional risk that subsequent government action would negate its commitments. Accordingly, this Court should reject the government's proposed expansion of the unmistakability rule both because it is legally erroneous and because it would have a deleterious effect on government contracting to the detriment of the public interest.

A. The Unmistakability Principle Comes Into Play When A Party Contends That The Government Has By Implication Surrendered A Sovereign Power, But It Does Not Displace Ordinary Interpretive Principles For Every Government Contract That Imposes Some Constraint On Government Action

The source of the "unmistakability" rule is a series of 19th century cases that put forth the unremarkable proposition that the government should not be *presumed* to have contracted away its sovereign power to tax private entities. The cases involved contracts addressed to business arrangements between the government and private parties, and the Court ruled that it would not lightly find an implied waiver of the government's sovereign power to tax. The rationale for the private parties' argument was that their contracts neither listed taxation as one of the conditions of the arrangement nor expressly reserved that power for the future. The Court, however, held that it would find such a contractual waiver by the government only if it was actually stated in unmistakable terms.

Although the Court has referred to this principle from time to time, its contours have not substantially changed since its inception. The government enters into innumerable contracts in which it makes promises that commit it to certain courses of action and that, correspondingly, entail implicit promises to refrain from action that would breach those commitments. In contrast to cases involving a claimed surrender of the power to tax, there is no reason in run-of-the-mill contract situations for a court to doubt that, as part of the bargain, the government implicitly agreed to constrain its future actions in order to allow performance of its direct promise. Accordingly, the rationale for the unmistakability rule is absent, and it should not be extended to every government contract.

In this case, the nature of the government promise in connection with respondents' goodwill accounting is far removed from a critical sovereign power like the taxing power; it is not appropriate to erect an "unmistakability" hurdle to concluding that the government did make a binding promise to respondents on this point. Rather, the scope of the contractual obligation should be resolved by applying regular principles of contract interpretation.

1. The seminal case is *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514 (1830), where the Court held that the state charter issued to a bank did not carry with it a promise not to tax the bank in the future. The Court commented that the taxing power benefits the entire community, and therefore "its abandonment ought not to be presumed, in a case in which the deliberate purpose of the state to abandon it does not appear." *Id.* at 561. *See also St. Louis v. United Rys. Co.*, 210 U.S. 266, 275-76, 280 (1908); *Vicksburg, S. & P.R. Co.*

v. Dennis, 116 U.S. 665, 668 (1886); *Jefferson Branch Bank v. Skelly*, 66 U.S. (1 Black) 436, 446 (1862).

The government purports to derive from these cases a "long-established" and much broader rule of general contract interpretation -- namely, that "contracts that limit the government's future exercises of regulatory authority . . . will be recognized . . . only when the limitation on future regulatory authority is expressed in unmistakable terms." Br. 16; *see also* Br. 18. But these cases are hardly so expansive as to cover every routine act of government regulation. Indeed, each of the older cases cited by the government for this broad proposition in which the Court invoked the unmistakability rule to justify a restrictive contract interpretation (Br. 17-18) involved a claimed contract right that infringed on the government's *taxation* power.[1]

Thus, the government's broad view of unmistakability is premised entirely on dicta, not the holdings of these cases. Even the dicta, however, have been stretched far beyond their bounds by the government's characterizations here. The government relies (Br. 18) primarily on one sentence in *The Delaware R.R. Tax*, 85 U.S. (18 Wall.) 206, 225-26 (1873), which describes the unmistakability rule as applying "with special force" when the claimed contract right "calls for any abridgement of the powers of the government." As the next sentence makes clear, however, the phrase "powers of the government" was not meant to encompass the entire spectrum

---

1 *Home Tel. & Tel. Co. v. City of Los Angeles*, 211 U.S. 265 (1908), does not involve the taxation power, but it also does not involve interpretation of a contract. Rather, the issue addressed by the Court was whether a municipal agency had the authority to enter into a contract guaranteeing certain telephone rates. *Id.* at 273-74.

of regulatory or other actions that fall within the government's broad authority. The Court continued (*id.* at 226): "The power of taxation is an attribute of sovereignty, and is essential to every independent government." Not every government power is "essential" nor does every constraint on governmental action "affect[] the sovereignty of the State." *Piqua Branch v. Knoop*, 57 U.S. (16 How.) 369, 390 (1853).

The government actions in this case fall outside the narrow category of sovereign powers that warrant a prophylactic "unmistakability" inquiry in construing a contract. The government's authority to establish capital requirements for financial institutions, and certainly the details of how to measure a particular institution's capital, are hardly powers that are "essential to every independent government." *See The Delaware R.R. Tax*, 85 U.S. (18 Wall.) at 226. There is accordingly no particular reason to be skeptical that government regulators might obligate themselves contractually to preserve certain treatment of goodwill for a particular financial institution in exchange for consideration provided by that institution for the benefit of the government. Indeed, as the Federal Circuit noted, the FSLIC was authorized by statute both to set minimum capital limits on a case-by-case basis and to extend assistance to acquirers of insolvent FSLIC-insured thrifts. Pet. App. 39a, citing 12 U.S.C. (1986 ed.) §§ 1730(t)(2), 1729(f)(2)(A). In these circumstances, the Court's prior decisions that are the source of the unmistakability principle are inapposite, and the contract should be interpreted by reference to the usual inquiry into the intent of the contracting parties.

The more recent cases cited by the government (Br. 16-17) are no more supportive of its position than are the 19th

century taxation cases. Although these decisions mention the unmistakability rule in passing, they rely primarily on other evidence of the intent of the parties. They do not apply the rule in a way that departs from the narrow contours of the earlier cases, and they certainly do not evince any intent to expand the rule.

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982), is essentially indistinguishable from the early cases. A sovereign Indian Tribe entered into a lease contract allowing a company to produce oil and gas on tribal lands in exchange for royalty payments. When the Tribe enacted a severance tax, the company argued that implicit in the lease arrangement was a contractual promise by the Tribe not to impose severance taxes. This Court rejected that argument, observing that the Tribe's power to tax did not hinge on exercising that power when it first granted the leases (*id.* at 145) and that the Tribe did not need to insert an express reservation of the taxing power in the lease contract (*id.* at 147). In the course of its discussion, the Court cited its earlier taxation cases for the proposition that a government's sovereign power ordinarily should survive a contract "unless surrendered in unmistakable terms" (*id.* at 148), but that citation suggests no expansion of the unmistakability rule.

The government relies most heavily on language in *Bowen v. Public Agencies Opposed to Social Security Entrapment (POSSE)*, 477 U.S. 41 (1986), which does differ in some respects from the typical taxation case. *POSSE* involved an agreement between California and the federal government to bring the state's employees within the federal Social Security program -- an agreement made "in conformity with" section 418 of the Social Security Act, which at that

time allowed a state to terminate its participation in the program. *See id.* at 48. The Court rejected California's argument that this agreement rendered unconstitutional a later amendment to the Social Security Act that eliminated a state's power to withdraw from the program.

Contrary to the government's suggestion, it is clear that *POSSE* did not expand the unmistakability rule; the Court did not even purport to "rel[y] on the principle" (Gov't Br. 16) of unmistakability for its holding. The language quoted by the government comes from an introductory section of the Court's opinion in which it listed several principles that formed "the backdrop" for its consideration of California's claim, most of which were closely related to the specific Social Security context before the Court. 477 U.S. at 52. Among these principles were: (1) that the Act contains "a clause expressly reserving to [Congress] '[t]he right to alter, amend, or repeal any provision' of the Act"; (2) that the Act itself created no contractual rights; (3) that this concern against foreclosing Congress from exercising its authority "take[s] on added force" in the context of "a comprehensive social welfare program affecting millions of individuals"; and (4) that "[i]n view of the purpose and structure of the Act, and of Congress' express reservation of authority to alter its provisions, courts should be extremely reluctant to construe § 418 Agreements in a manner that forecloses Congress' exercise of that authority." *Id.* at 51-53.[2]

---

[2] The government's partial quotation of this last statement (Br. 16) is misleading in that it suggests that the Court was making a general comment about all agreements and all government powers. The full text makes clear that the Court was addressing only section 418 agreements and was relying on the specific features of the Social Security Act, including its express reservation of the power to alter its provisions.

Nestled within this list was a quote from *Merrion* stating that "sovereign power . . . will remain intact unless surrendered in unmistakable terms." *Id.* at 52 (quoting 455 U.S. at 148). The Court never returned to this "unmistakability" principle in the body of its opinion and did not rely upon it for its holding. Rather, the Court emphasized three points in ruling against California: (1) the existence of a statutory provision explicitly reserving the right to amend the Act, which "expressly notified the State that Congress retained the power to amend the law under which the Agreement was executed and by amending that law to alter the Agreement itself" (*id.* at 54); (2) that the agreement by its terms expressly incorporated section 418, which was subject to amendment (*id.*); and (3) that the clause in the agreement relied upon by the State "was not unique to this Agreement; nor was it a term over which the State had any bargaining power or for which the State provided independent consideration" (*id.* at 55).

Thus, the Court in *POSSE* never discussed whether or how the unmistakability rule would apply in the specific context presented there. Certainly, in quoting from or paraphrasing *Merrion*, it did not expand the rule beyond its previously recognized bounds. And the Court's decision in no way suggests that the unmistakability rule should apply here, to a situation that lacks any of the three features on which it primarily relied in *POSSE*.

The third modern case cited by the government, *United States v. Cherokee Nation*, 480 U.S. 700 (1987), similarly adds nothing to the traditional understanding of the

unmistakability rule. The Court there emphatically rejected the contention that, when the United States conveyed to an Indian Tribe title to a riverbed, it implicitly contracted away the navigational servitude that permits it to make improvements in aid of navigation. The Court stated that it "would be wholly extraordinary" to imply such a provision into the treaty since "the navigational servitude applies to *all* holders of riparian and riverbed interests." *Id.* at 706. Indeed, the Court continued, even when the States "gain 'the absolute right to all their navigable waters,'" that right is "unquestionably subject to 'the paramount power'" of the federal government's navigational servitude. *Id.* at 707 (quoting *Montana v. United States*, 450 U.S. 544, 551 (1981)). Only after giving this explanation of why the Tribe's contractual contention was so implausible did the Court add a single sentence quoting the *Merrion* formulation of the unmistakability rule. The Court did not elaborate on that rule in *Cherokee Nation*, and its citation of the rule in connection with the navigational servitude, an inherently sovereign power akin to taxation, lends no support to the government's effort to expand the rule to apply to every manner of government action.[3]

---

[3] The government attempts to blunt somewhat the breadth of its contentions by describing the unmistakability doctrine in terms of federal "regulatory" authority. That is not much of a limitation, however, when it sweeps wide enough to encompass details about whether the government will honor specific contract terms related to the calculation of capital for a particular institution. Moreover, the government's approach stretches well beyond any common sense understanding of the term "regulatory." In its petition for certiorari (at 24), the government criticized not only the decision below but also the Federal Circuit's decision in *Hughes Communications Galaxy, Inc. v. United States*, 998 F.2d 953 (1993). The government, through NASA, had entered the business of launching commercial satellites and had contracted to launch numerous satellites on behalf of private companies. After the Challenger disaster, however, the President determined that "NASA would no longer be in the business of launching commercial spacecraft" (*id.* at 956), and the government advised several companies that it would not honor its contracts to launch the satellites. In the *Hughes* case, the government defended against one company's breach of contract suit by invoking (unsuccessfully) the unmistakability defense, even though the government's decision to remove itself from the commercial launch business cannot reasonably be characterized as "regulatory."

2. This case differs from the line of unmistakability cases in another important respect wholly unrelated to the difference in the nature of the governmental power involved. The unmistakability cases typically involve claims of *implied* government promises that are tangential, at best, to the focus of the contractual terms. Claimants in those cases argued, for example, that contracts issuing a bank charter, a streetcar license, or an oil lease implicitly carried with them a promise not to tax the new enterprise, even though the contracts said nothing specific about taxation.

By contrast, the contractual claim here goes to the heart of the bargain made by the parties. It is not disputed that the parties engaged in "extensive negotiations" (Pet. App. 22a) over the terms of the accounting treatment of goodwill and amortization that would be permitted and that it "was the intent of the parties" (*id.*) that the government would incur contractual obligations as a result of those negotiations, which were reduced to writing in documents that were incorporated into the contract. Indeed, the Court of Federal Claims found that these promises regarding regulatory accounting were the "linchpin" of the contracts without which no purchaser would

have entered into the contracts. Pet. App. 154a. The government argues, however, that the unmistakability rule means that these promises are worthless in the face of subsequent Congressional or regulatory action.

That argument is contradicted by prior precedent of this Court. For example, in *Piqua Branch v. Knoop*, the Court discussed *Providence Bank* in detail and distinguished it on the ground that general principles of unmistakability cannot defeat a specific contractual undertaking. 57 U.S. (16 How.) at 387-88. In that case, a bank charter specified a particular tax rate and, even though the charter said nothing about the impact of future legislative changes, the Court held that subsequent legislation imposing a higher tax rate was an unconstitutional impairment of contract. *Id.* at 392; *cf. id.* at 409, 414 (Campbell, J., dissenting) (arguing that charter lacks "expression of such a deliberate purpose" to forgo "exercise of a sovereign power" and therefore the case should be controlled by *Providence Bank*). *See also United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977); *W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56 (1935); *Lynch v. United States*, 292 U.S. 571 (1934).

This Court's discussion in *Murray v. Charleston*, 96 U.S. 432 (1878), is especially instructive. In that case, a city sought to impose a tax on the holders of its own debt instruments. The practical effect of the two percent tax was to reduce the six percent interest payments owed to the holders of the debt instruments. The underlying contracts said nothing about constraining the city's sovereign right to tax, and therefore the unmistakability rule presumably would have insulated the city's tax from attack if the rule meant what the government argues here.

This Court, however, refused to allow the city's sovereign power to trump its contractual obligations in that fashion. The Court observed that "[a] promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity." 96 U.S. at 445. More generally, the Court stated that "[i]t is against the rules, both of law and of reason, to admit by implication in the construction of a contract a principle which goes in destruction of it." *Id.* These observations are equally pertinent here. It is absurd to read the contracts as containing a promise to allow a particular treatment of goodwill, while at the same time implicitly reserving for the government the right to revoke that promise by subsequent unilateral action. The unmistakability rule was designed to aid in implementing the intent of the parties, and it does not call for such a counterintuitive result.

B. The Unmistakability Rule Is Inapplicable In A Suit For Breach Of Contract Damages

The Federal Circuit correctly held (Pet. App. 37a-39a) that there is no basis for applying a special unmistakability rule of contract interpretation where a party does not seek to prevent the government from exercising its power. No case, including the numerous cases cited by the government here, has ever invoked the rule in order to reject a claim for breach of contract damages. Indeed, the ancestor of the Court of Federal Claims was created more than a century ago for the specific purpose of adjudicating monetary claims against the government. During that period, the Court of Federal Claims and its predecessors have been the near-exclusive forum for breach of contract suits against the government, issuing countless decisions holding the government liable in damages for breach of contract. That no case antedating the ones

before this Court even discussed the possibility that the damage awards could be barred by the unmistakability rule (which the government itself notes has been "recognized" since 1830 (Br. 17)) strongly confirms the Federal Circuit's conclusion that the government's invocation of the rule in a suit for damages expands it well beyond its historical bounds.[4]

Moreover, the government's rejection of the Federal Circuit's distinction cannot be squared with the text of the Tucker Act, 28 U.S.C. § 1491(a)(1), which makes the government liable in damages for claims founded "upon any express or *implied* contract with the United States" (emphasis added). Notwithstanding the unmistakability rule, Congress thus clearly contemplated that the United States would be liable in damages for actions that breach a contractual obligation -- even one that is not express at all, much less expressed in unmistakable terms.

It is logical and reasonable to apply a more stringent rule of contract interpretation in favor of the government

---

[4] The government argues (Br. 21) that *Cherokee Nation* refutes the Federal Circuit's distinction because the Tribe there was seeking to recover money from the government. But *Cherokee Nation* was not a breach of contract suit. Rather, the Tribe was seeking just compensation for an alleged taking of property. The Court ruled that the Tribe did not have the alleged property interest because it received title to the riverbed subject to the navigational servitude -- a power that stems directly from the Commerce Clause and has invariably been preserved for the federal government even against the states. *See* 480 U.S. at 704, 707. Thus, the Tribe *never* had a contract right, and the case is inapposite here where the respondents unquestionably did have a contract right and the government's argument is that the right can be destroyed by subsequent governmental action because of the unmistakability rule.

when a private party seeks to enjoin the exercise of sovereign power than when it seeks breach of contract damages for the exercise of that power. Preventing the government from taking the actions it deems necessary for governance poses far more difficult jurisprudential issues than does holding the government financially responsible for its conduct. This distinction between constraint on government action and recovery of damages is akin to that embodied in the Fifth Amendment, which "does not prohibit the taking of private property, but instead places a condition on the exercise of that power" -- namely, requiring that it pay financial compensation for the taking. *Preseault v. ICC*, 494 U.S. 1, 11, (1990); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314 (1987).

The imposition of damages for breach of contract, like the need to pay just compensation, simply does not raise the kind of concern about intrusion into governmental prerogatives that lies at the heart of the unmistakability cases cited by the government. Paying damages is not a "surrender" of government power (Gov't Br. 18 (quoting *Jefferson Branch Bank v. Skelly*, 66 U.S. (1 Black) at 446)), and it does not "foreclos[e] exercise of sovereign authority" (Gov't Br. 16 (quoting *POSSE*, 477 U.S. at 53)).

The government's response to the distinction drawn by the Federal Circuit is tainted by the same flaw that infects its general discussion of the unmistakability principle -- namely, expanding a relatively narrow rule beyond its previously recognized bounds. Thus, the government objects (Br. 21) that if the government must pay damages for exercising regulatory authority, that could "deter" or impose some "control" on future government action. But the concern underlying the unmistakability cases was with contractual

commitments that would *foreclose* the government from future action; a contract that merely "deters" such action does not warrant any special prophylactic interpretive rule. Indeed, it is difficult to imagine any promise that a government would make in even the most ordinary contract that could not be said to act as some deterrent to future government action in derogation of that promise.

In any event, the government's argument that liability for damages is tantamount to restricting the sovereign's freedom of action is particularly tenuous in this case. Both the contracts entered into by the government here and the subsequent actions claimed to breach those contracts are primarily about money. The government made its promises concerning the treatment of goodwill in order to induce the respondents to make deals that the government believed would save it money -- by reducing the amount it would pay under the FSLIC insurance program. *See* Pet. App. 5a. The government later regretted the bargain it had struck and disallowed the approved goodwill treatment -- again because of concerns about the long-term health of the industry and the government's potential FSLIC insurance liability obligations. *See* Gov't Br. 5. The law does not afford contracting parties, including the government, the luxury of such hindsight, and it is no threat to sovereignty to hold the government to its financial bargain.

In short, the breach of contract claims here simply do not involve the kind of institutional concerns that animate the unmistakability line of cases. Rather, this case is much closer to the ones identified by this Court as inappropriate for invocation of the unmistakability rule -- namely, those where the government repudiates its obligations "simply in order to save money." *POSSE*, 477 U.S. at 55.

II. THE SOVEREIGN ACT DEFENSE DOES NOT EXCUSE THE GOVERNMENT FROM BREACH OF CONTRACT LIABILITY

A. The sovereign act defense was delineated by the Court of Claims in the earliest days of its existence. *Deming v. United States*, 1 Ct. Cl. 190 (1865); *Jones v. United States*, 1 Ct. Cl. 383 (1865). This Court has approved its general principles as "correct" (*Horowitz v. United States*, 267 U.S. 458, 461 (1925)), but the more detailed development of the doctrine has been left to the Court of Claims and its successors. As the government acknowledges (Br. 43), the doctrine is generally designed to afford the government, in its contracting capacity, a defense that would be available to a similarly situated private contractor. When a "public and general" governmental act prevents performance, a private contractor would not be liable for breach of contract damages, and the sovereign act doctrine similarly excuses the government from liability. *Horowitz v. United States*, 267 U.S. at 461; *Jones v. United States*, 1 Ct. Cl. at 384 (1925).

The sovereign act doctrine is narrowly defined in that it is not designed to confer any special immunity on the government that would not be available to a private contractor. The defense is addressed to those situations where a public and general act "incidentally impair[s]" the contract rights. *O'Neill v. United States*, 231 Ct. Cl. 823, 826 (1982). It is inevitable that government actions will sometimes impair a party's ability to perform a contract, but those situations ordinarily do not make a private party liable for breach. "The policy underlying the sovereign act doctrine is that in those circumstances, the Government in its

contracting role, like its private counterpart, should not incur liability for its act done in the governing role." *Id.*

Thus, the sovereign act defense is merely one facet of the general principle that, when the government "comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there." *Cooke v. United States*, 91 U.S. 389, 398 (1875). *See also Perry v. United States*, 294 U.S. 330, 352 (1935); *Sinking Fund Cases*, 99 U.S. 700, 719 (1879). As a general rule, therefore, it is instructive to measure the availability of the defense by looking to how a private party's liability would be affected by the government action. "[A] citizen or corporate body must by supposition be substituted in [the government's place], and then the question be determined whether the action will lie against the supposed defendant." *Jones*, 1 Ct. Cl. at 385. *See also Horowitz*, 267 U.S. at 461; *O'Neill*, 231 Ct. Cl. at 826.

Here, the "substitution test" does not come into play because the "sovereign act" clearly fails the "public and general" standard. That standard ensures that the defense cannot be used to shield the government from liability when a sovereign act is targeted at the bargained-for rights of government contractors. As the Court of Claims held in *Sun Oil Co. v. United States*, 572 F.2d 786, 817 (Ct. Cl. 1978), the defense is not available for governmental action that is "directed principally and primarily at plaintiffs' contractual right."

This restriction on the defense does not hinge upon the government's *motivation* -- that is, it does not require that the sovereign act be an attempt to relieve the government from its bargain. On the contrary, the government action may be

motivated by public concerns that have nothing to do with the considerations that underlay the contract. If the effect is to target a set of contractual rights, however, there is no sovereign act defense.

Thus, the Court of Claims has consistently rejected the sovereign act defense in the case of government action narrowly focused on contract rights, even where the action unquestionably was motivated by "general" policy goals designed to serve the "public" at large. For example, in *Sun Oil Co. v. United States*, environmental concerns caused the government to withdraw permission for an offshore oil well. *See also Everett Plywood Corp. v. United States*, 651 F.2d 723, 729-32 (Ct. Cl. 1981) (lumber contract cancelled for environmental reasons). Similarly, in *Miller v. United States*, 140 F. Supp. 789, 790-94 (Ct. Cl. 1956), the government cancelled a contract for the sale of surplus aircraft because of national security concerns. In each of these cases, the "high reasons of public policy" (*Everett Plywood*, 651 F.2d at 728) did not insulate the government from liability for actions that were targeted at particular contract rights, and the court upheld breach of contract liability against the government in the face of a claimed sovereign act defense.

Accordingly, the government's contention here that the sovereign act doctrine applies because FIRREA was a law enacted "to advance the general welfare" (Br. 45) is not dispositive. The motivation of the legislation may have been laudable, but the Federal Circuit correctly found that "the principal effect" of the provisions addressed to supervisory goodwill was "to abrogate specific contractual rights" arising out of mergers like those engaged in by respondents. Pet. App. 40a, citing 12 U.S.C. §§ 1464(t)(3)(A) and (9)(B).

These provisions therefore are not "public and general" within the meaning of the sovereign act cases.

Indeed, in one important respect, the government's claim here is even weaker than in some of the cases where the Court of Claims previously rejected the sovereign act defense. The government action here was not motivated by some new, general welfare consideration extrinsic to the bargain, such as heightened environmental concerns. Rather, the considerations relevant to both the original bargain and the subsequent legislation were the same -- the health of the thrift industry and the attendant cost to the government's insurance fund. *See* Pet. App. 45a. The government backed out of the supervisory goodwill deal simply because it decided that it had miscalculated in entering the original deal, which is hardly an appropriate setting for escaping liability for breach of contract damages. For all these reasons, the Federal Circuit correctly rejected the government's sovereign act defense.

B. The Court of Claims also has ruled that the sovereign act defense is not available when the government action contravenes a contractual promise that is sufficiently direct to warrant the conclusion that the government assumed the financial responsibility for an intervening sovereign act. The source of this rule is *United States v. Bostwick*, 94 U.S. 53, 68-69 (1877), where the Court considered the government's liability for damage done by the military to privately-owned land. The Court ruled that the government was liable for the damage that occurred after it leased the land from the owner, but not for damage occurring before the government was a tenant. The reason for the differential treatment was that the lease carried with it an implied promise not to waste or damage the property; the government

was liable for breaching that lease covenant. In the words of the Court: "All depends upon the contract. Without that, the jurisdiction does not include actions for damages by the army; with it, damages contracted against may be recovered as for a breach of the contract." 94 U.S. at 69.

Bostwick teaches that the nature of a contractual promise may determine whether the government has assumed financial responsibility for sovereign acts that interfere with its contractual obligations. The Court of Claims has described the effect of this principle on the sovereign act defense as follows: "The doctrine of 'public and general' 'sovereign acts,' laid down in *Horowitz* . . . does not relieve the government from liability where it has specially undertaken to perform the very act from which it later seeks to be excused." *Freedman v. United States*, 320 F.2d 359, 366 (Ct. Cl. 1963).[5]

This doctrine is particularly applicable to contracts that expressly incorporate an existing government regulation or policy as a term of contract performance. In two recent cases involving such contracts, the Federal Circuit has rejected the government's attempt to invoke the sovereign act defense to avoid paying damages that arise from a change in the governmen. policy. In *Hills Materials Co. v. Rice*, 982 F.2d 514 (Fed. Cir. 1992), the court observed that the sovereign act doctrine "certainly does not prevent the government as contractor from affirmatively assuming responsibility for specific sovereign acts." *Id.* at 516 n.2. The court held that

---

[5] *See also D & L Constr. Co. v. United States* 402 F.2d 990, 999 (Ct. Cl. 1968); *Gerhard F. Meyne Co. v. United States*, 76 F. Supp. 811, 815 (Ct. Cl. 1948); *Sunswick v. United States*, 75 F. Supp. 221, 228 (Ct. Cl. 1948).

a provision in the contract requiring the contractor to adhere to specified OSHA regulations governing the slope of excavations rendered the government liable for the excess costs when OSHA changed the regulatory standard in a way that made the excavation more expensive. *Id.* at 515-16.

By the same token, in *Hughes Communications Galaxy, Inc. v. United States*, 998 F.2d 953 (Fed. Cir. 1993), the government expressly promised in the contract to provide satellite launch services in accordance with "the United States policy governing launch assistance approved by the President . . . on August 6, 1982." *Id.* at 957. The court ruled that the sovereign act doctrine could not immunize the government from breach of contract damages that ensued when the President later approved a different policy that prevented NASA from providing the agreed-upon launch services. *Id.* at 958-59 & n.8.

In these cases, the incorporation in the contract of the prior policy was a direct promise by the government to perform in accordance with that policy and, correspondingly, to bear the financial risk if a sovereign act changing that policy prevented that performance. Similarly here, the incorporation in respondents' contracts of the relevant Bank Board policies and letters regarding treatment of supervisory goodwill constitutes a direct promise that prevents invocation of the sovereign act defense.

CONCLUSION

The judgment of the Federal Circuit should be affirmed.

Respectfully submitted,

OF COUNSEL:

PROFESSOR JOHN CIBINIC, JR.
George Washington University
Law School
Washington, D.C. 20052

KATHLEEN A. BUCK
Kirkland & Ellis
Washington, D.C. 20005

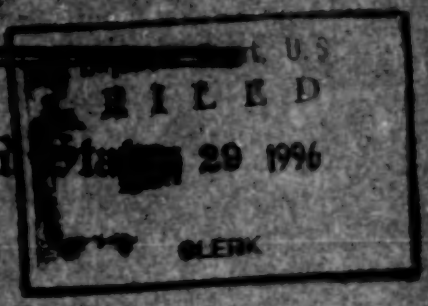
MAC S. DUNAWAY
GARY E. CROSS
Dunaway & Cross
Washington, D.C. 20036

CLARENCE T. KIPPS, JR.
Counsel of Record
ALAN I. HOROWITZ
KEVIN C. DWYER
MILLER & CHEVALIER,
Chartered
Metropolitan Square
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 626-5800

MARCH 1996

No. 95-[illegible] (12)

[illegible] U.S.
FILED
[illegible] 29 1996
CLERK



IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Petitioner,
v.

WINSTAR CORPORATION, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENTS

HERBERT L. FENSTER *
TAMI LYN AZORSKY
JULIE M. WILLIAMSON
MARK A. ROWLAND
MARGARET C. RHODES
HUGO TEUFEL, III
MCKENNA & CUNEO, L.L.P.
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-7500

ROBIN S. CONRAD
NATIONAL CHAMBER LITIGATION
CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Attorneys for Amicus Curiae
The Chamber of Commerce
of the United States
of America

March 29, 1996

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0[illegible] - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

38 pp

QUESTIONS PRESENTED

1. Whether a contract with the United States, valid when entered, may be abrogated by a change in the law.

2. Whether and to what extent compensation is due to a party whose contract with the United States is unilaterally voided by the United States.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT OF INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. RESPONDENTS POSSESSED VALID CONTRACT RIGHTS BEFORE AND AFTER THE ENACTMENT OF FIRREA	4
A. Respondents Entered Into Valid Contracts	4
B. Valid Contract Rights Survive Subsequent Legislation That Alters A Contracting Agency's Authority	5
C. The Power To Legislate Does Not Include The Power To Destroy Vested Contract Rights	10
1. The Right To Terminate A Contract Due To A Change In Government Circumstances Must Be Specifically Reserved	10
2. The "Unmistakability Doctrine" Does Not Protect Against Abrogation Of Vested Rights	13
3. The Sovereign Act Doctrine Has Limited Application	16
II. CITIZENS MUST BE COMPENSATED FOR THE DESTRUCTION OF VESTED RIGHTS	18
A. Breach Of Contract Provides Compensation For The Denial Of Vested Contract Rights	19
B. A Takings Claim Provides Compensation For Denial Of Any Property Right, Including Vested Contract Rights	21

TABLE OF CONTENTS—Continued

	Page
1. The Destruction Of Respondents' Vested Contract Rights By The Enactment Of FIRREA Is A Taking Within The Meaning Of The Fifth Amendment	21
2. Respondents Are Entitled To Compensation To Place Them In The Position They Would Have Been Had The Taking Not Occurred	22
C. Frustration Of Purpose Allows A Citizen To Rescind The Contract And Obtain Restitution	24
D. The Public Debt Clause Protects Those Who Have Delivered Services To The United States	26
CONCLUSION	29

TABLE OF AUTHORITIES

Cases	Page
Air Terminal Servs., Inc. v. United States, 330 F.2d 974 (Ct. Cl. 1964)	16
American Satellite Co. v. United States, 998 F.2d 950 (Fed. Cir. 1993)	15
Armstrong v. United States, 364 U.S. 40 (1960)	21
Barrett Co. v. United States, 273 U.S. 227 (1927)	12
Bowen v. Public Agencies Opposed to Social Sec. Entrapment, 477 U.S. 41 (1986)	6, 7
Brooks-Scanlon Corp. v. United States, 265 U.S. 106 (1924)	21, 23
City of El Centro v. United States, 922 F.2d 816 (Fed. Cir. 1990), *cert. denied*, 501 U.S. 1230 (1991)	4
D & L Constr. Co. v. United States, 402 F.2d 990 (Ct. Cl. 1968)	17
De Laval Steam Turbine Co. v. United States, 284 U.S. 61 (1931)	12, 23
Estate of Berg v. United States, 687 F.2d 377 (Ct. Cl. 1982)	19
Everett Plywood Corp. v. United States, 651 F.2d 723 (Ct. Cl. 1981)	24
Far W. Fed. Bank, S.B. v. Director, Office of Thrift Supervision, 787 F. Supp. 952 (D. Or. 1992)	25
Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947)	4, 5
Federal Housing Admin. v. Darlington, Inc., 358 U.S. 84 (1958)	6, 7
Freedman v. United States, 320 F.2d 359 (Ct. Cl. 1963)	16
G. L. Christian & Assocs. v. United States, 312 F.2d 418 (Ct. Cl.), *cert. denied*, 375 U.S. 954 (1963)	13
Galveston Elec. Co. v. Galveston, 258 U.S. 388 (1922)	23
Gerhardt F. Meyne Co. v. United States, 76 F. Supp. 811 (Ct. Cl. 1948)	17
Guaranty Fin. Servs., Inc. v. Ryan, 928 F.2d 994 (11th Cir. 1991)	5, 16, 17
Horowitz v. United States, 267 U.S. 458 (1925)	16

TABLE OF AUTHORITIES—Continued

	Page
Hughes Communications Galaxy, Inc. v. United States, 998 F.2d 953 (Fed. Cir. 1993)	15, 17
Hughes Communications Galaxy, Inc. v. United States, 26 Cl. Ct. 123 (1992), *rev'd on other grounds*, 998 F.2d 953 (Fed. Cir. 1993)	16
International Arms & Fuze Co. v. United States, 101 Ct. Cl. 297 (1944)	12
Jefferson Branch Bank v. Skelly, 66 U.S. (1 Black) 436 (1861)	14
Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827 (1990)	6
Kimball Laundry Co. v. United States, 338 U.S. 1 (1949)	23
Landgraf v. USI Film Prods., 114 S. Ct. 1483 (1994)	5, 6
Larionoff v. United States, 533 F.2d 1167 (D.C. Cir. 1976), *aff'd*, 431 U.S. 864 (1977)	5
Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)	5
Lynch v. United States, 292 U.S. 571 (1934)	6, 9, 10, 21
Murray v. Charleston, 96 U.S. 432 (1877)	8, 9
Norman v. Baltimore & O.R.R., 294 U.S. 240 (1935)	6, 8
Olson v. United States, 292 U.S. 246 (1934)	22, 24
Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978)	21
Perry v. United States, 294 U.S. 330 (1935)	*passim*
Providence Bank v. Billings, 29 U.S. (4 Pet.) 514 (1830)	14
Ramsey v. United States, 101 F. Supp. 353 (Ct. Cl. 1951), *cert. denied*, 343 U.S. 977 (1952)	19
Resolution Trust Corp. v. Federal Sav. & Loan Ins. Corp., 25 F.3d 1493 (10th Cir. 1994)	24, 25, 26
Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984)	21, 22
Russell Motor Car Co. v. United States, 261 U.S. 514 (1923)	12
Seatrain Lines, Inc. v. United States, 99 Ct. Cl. 272 (1943)	18
Sinking-Fund Cases, 99 U.S. 700 (1879)	10, 19

TABLE OF AUTHORITIES—Continued

	Page
Society for Propagation of the Gospel v. Wheeler, 22 F. Cas. 756 (C.C.D.N.H. 1814) (No. 13, 156)	6
Sun Oil Co. v. United States, 572 F.2d 786 (Ct. Cl. 1978)	13
Sunswick Corp. v. United States, 75 F. Supp. 221 (Ct. Cl.), *cert. denied*, 334 U.S. 827 (1948)	18
Thompson v. United States, 9 Ct. Cl. 187 (1873)	11
United States v. Behan, 110 U.S. 338 (1884)	10
United States v. Bostwick, 94 U.S. (4 Otto) 53 (1876)	17
United States v. Commodities Trading Corp., 339 U.S. 121 (1950)	23
United States v. Larionoff, 431 U.S. 864 (1977)	5, 28
United States v. Miller, 317 U.S. 369 (1943)	22
United States v. Spearin, 248 U.S. 132 (1918)	10
United States v. Speed, 75 U.S. (8 Wall.) 77 (1868)	11
United States v. Toronto, Hamilton & Buffalo Navigation Co., 338 U.S. 396 (1949)	23
Wah Chang Corp. v. United States, 282 F.2d 728 (Ct. Cl. 1960)	18
Wells Fargo Bank, N.A. v. United States, 33 Fed. Cl. 233 (1995)	20
Winstar Corp. v. United States, 64 F.3d 1531 (Fed. Cir. 1995), *cert. granted*, 133 L. Ed. 2d 753 (1996)	16
Winstar Corp. v. United States, 994 F.2d 797 (Fed. Cir. 1993), *vacated mem.* No. 92-5164 (Fed. Cir. Aug. 18, 1993)	25
Constitution and Statutes	
U.S. Const. amend. V	21
U.S. Const. amend. XIV, § 4	27
Contract Settlement Act of 1944, ch. 358, 58 Stat. 649	12
Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183	2

TABLE OF AUTHORITIES—Continued

	Page
First War Powers Act, Pub. L. No. 77-354, 55 Stat. 828 (1941)	12
Urgent Deficiencies Appropriations Act, ch. 29, 40 Stat. 182 (1917), *repealed by* Act of June 5, 1920, ch. 250, 41 Stat. 988	11, 12
12 U.S.C. § 1725(c)(3) (1988) (repealed 1989)	4
12 U.S.C. § 1729(f)(2)(A) (1988) (repealed 1989)	4
12 U.S.C. § 1730(t)(2) (1988) (repealed 1989)	4
42 U.S.C. § 1304 (1994)	7
Congressional Materials	
H.R. Rep. No. 54(V), 101st Cong., 1st Sess. 24, *reprinted in* 1989 U.S.C.C.A.N. 397	16
135 Cong. Rec. H2565 (daily ed. June 14, 1989)	16
Other Materials	
40 Op. Att'y Gen. 53 (1942)	12
Beauregard, *Termination for Convenience as Breach of a Government Contract*, 7 B.C. Indus. & Com. L. Rev. 259 (1966)	10
C. Friend, *Actions and Remedies* § 4:23 (1987)	26
W. Jaeger, *Williston on Contracts* § 1338 (3d ed. 1968)	19
W. Jaeger, *Williston on Contracts* § 1344 (3d ed. 1968)	19
W. Jaeger, *Williston on Contracts* § 1485 (3d ed. 1968)	26
Peter S. Latham, *The Sovereign Act Doctrine in the Law of Government Contracts: A Critique and Analysis*, 7 U. Tol. L. Rev. 29 (1975)	17
McCormick, *Handbook on the Law of Damages* § 137 (1935)	19
Office of Contract Settlement, *A History of War Contract Terminations and Settlements* (July 1947)	12
Restatement (Second) of Contracts § 265 (1981)	24
Restatement (Second) of Contracts § 344 (1981)	20
Restatement (Second) of Contracts § 344(a) (1981)	19

TABLE OF AUTHORITIES—Continued

	Page
Restatement (Second) of Contracts § 349 (1981)	20
Restatement (Second) of Contracts § 371(a) (1981)	26
Restatement (Second) of Contracts § 371(b) (1981)	26
Restatement (Second) of Contracts § 377 (1981)	26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-865

UNITED STATES OF AMERICA,
Petitioner,

v.

WINSTAR CORPORATION, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the largest association of businesses, companies and associations in the world. With substantial membership in each of the fifty states, the Chamber represents more than 220,000 companies, trade and professional associations, and state and local Chambers of Commerce. It is the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members in critical issues before the Supreme Court. The Chamber seeks to

advance those interests by filing briefs in cases of importance to the business community.

Many of the Chamber's members contract with agencies of the United States government. Thus, the primary issue presented here is of great concern to all Chamber members. These members take issue with the government's position that Congress may unilaterally and retroactively abrogate valid contracts between private parties and the United States without compensation. The government's view of its contractual obligations would permit the United States to receive the benefits of its bargains, and then refuse to pay, making the contracts illusory. The Chamber believes it is important for the Court to recognize the significance of this issue to the business community.[1]

STATEMENT OF THE CASE

Stripped to its essence, this case is about whether the government can abrogate a key payment term in a contract that has been performed by the other contracting party and, on that basis, refuse to pay. Under a congressionally authorized program enacted to address the savings and loan crisis, Respondents, healthy thrifts at the time, agreed to acquire failing thrifts that otherwise would have cost the government hundreds of millions of dollars in federal funds. Part of the consideration promised by the government for Respondents' assumption of these government liabilities included an agreed value for supervisory goodwill to be amortized over an agreed term.

After formation of the contracts at issue, Congress passed the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183, which, among other things, limited the value of supervisory goodwill. Based on FIRREA, the

[1] Respondents and the United States have consented to the filing of this brief. Their respective letters of consent are filed herewith.

government attempted to modify unilaterally its contracts with the thrifts. The issue before the Court is whether a contract between an executive agency and a private party that was valid when entered can be voided by a subsequent act of Congress.

SUMMARY OF ARGUMENT

1. The Chamber's *amicus curiae* brief does not address whether in each of the individual situations at issue a contract was formed between Respondents and the Federal Savings and Loan Insurance Corporation ("FSLIC") and the Federal Home Loan Bank Board ("FHLBB"). Instead, the Chamber's brief establishes that:

(a) FSLIC and FHLBB had authority to enter into these contracts at the time of the agreements;

(b) once they exercised that authority, FSLIC and FHLBB created valid contract rights;

(c) those rights could not be voided by a subsequent act of Congress; and

(d) the government can avoid its obligation to perform only by the payment of breach of contract damages, just compensation under the Fifth and Fourteenth Amendments, or restitution.

2. Neither the unmistakability doctrine nor the sovereign act doctrine modifies this result. A contract need not waive the government's right to legislate in unmistakable terms in order to preserve a right to compensation for valid contract rights destroyed by legislation. Instead, if the government wants to limit its damages for non-performance, the government must expressly reserve the right to modify its contracts if circumstances change. Absent such express reservation, government non-performance, even if in response to legislation, subjects the government to liability for breach of contract or frustration of purpose. Alternatively, the government may be required to pay compensa-

tion under the Takings Clause of the Fifth Amendment or the Public Debt Clause of the Fourteenth Amendment.

ARGUMENT

I. RESPONDENTS POSSESSED VALID CONTRACT RIGHTS BEFORE AND AFTER THE ENACTMENT OF FIRREA

A. Respondents Entered Into Valid Contracts

The validity of all contracts to which the government is a party is dependent on a determination that the government agent whose conduct is relied upon to establish a contractual relationship possessed actual authority to bind the government. *Federal Crop Ins. Corp. v. Merrill,* 332 U.S. 380, 383 (1947); *City of El Centro v. United States,* 922 F.2d 816, 820 (Fed. Cir. 1990), *cert. denied,* 501 U.S. 1230 (1991). The United States Congress establishes the boundaries within which an agency can enter into contracts. As long as the agency acts within that authority, such contracts are valid and enforceable against the United States. *Merrill,* 332 U.S. at 383.

Prior to the enactment of FIRREA, FSLIC and FHLBB possessed the authority to bind the government in contract. *See, e.g.,* 12 U.S.C. § 1725(c)(3) (1988) (repealed 1989) (FSLIC and FHLBB had power "to make contracts"); 12 U.S.C. § 1729(f)(2)(A) (repealed 1989) (FSLIC and FHLBB possessed authority to extend assistance to acquirers of insolvent FSLIC-insured thrifts); 12 U.S.C. § 1730(t)(2) (repealed 1989) (FSLIC and FHLBB could set minimum capital requirements on case-by-case basis). Accordingly, FSLIC's contracting authority was sufficiently broad and discretionary to enable FSLIC to enter agreements regarding the valuation of goodwill.

B. Valid Contract Rights Survive Subsequent Legislation That Alters A Contracting Agency's Authority

Authority is determined at the time a contract is entered. Courts have long held that the regulatory environment in effect at the time of contracting determines the contractual rights of the parties. *See Merrill,* 332 U.S. at 384-85; *Larionoff v. United States,* 533 F.2d 1167, 1179-80 & n.35 (D.C. Cir. 1976), *aff'd,* 431 U.S. 864 (1977); *see also Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992) (holding that property rights are defined by the rules or understandings that existed prior to the exercise of police powers being challenged under the Fifth Amendment). Accordingly, subsequent statutory and regulatory mandates have no impact on the validity of contracts that were valid when executed.

Boilerplate clauses such as the "unlawful inaction clause" referenced by Petitioner (*see* Petitioner's Brief ("Pet. Br.") at 28, 31, 35), do not alter this basic rule nor grant the government unilateral authority to modify the contract. Had the government considered reserving the unilateral right to change Respondents' agreements to conform to subsequent legislative or regulatory changes, the government knew exactly how to draft such a clause. In other similar cases involving thrifts, the government had negotiated clauses expressly reserving its right to change the terms of contracts based on changes in the law. *See, e.g., Guaranty Fin. Servs., Inc. v. Ryan,* 928 F.2d 994, 999 (11th Cir. 1991). That language does not appear in Respondents' contracts and the language of the unlawful inaction clause cannot fill the void.

To apply the unlawful inaction clause using a subsequently enacted law would be to authorize retroactive legislation. Retroactive legislation is legislation "which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past . . . ." *See Landgraf*

v. USI Film Prods., 114 S. Ct. 1483, 1499 & n.23 (1994) (quoting *Society for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756 (C.C.D.N.H. 1814) (No. 13,156) (citations omitted)). This Court generally has applied a presumption against retroactive effects for statutes, especially statutory provisions affecting contract or property rights. *Landgraf*, 114 S. Ct. at 1499-1500 & n.25. This presumption against statutory retroactivity supports the "'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place . . . .'" *Id.* at 1497 (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)).

Holding that Respondents' contract rights remained valid does not require this Court to place limits on Congress' ability to legislate. Respondents have never challenged Congress' authority to pass legislation which impacts contract or property rights. The issue to be determined is whether the government may pass such legislation compensating the affected parties.

There are three categories of cases relating to the impact of legislation on existing contracts: (1) cases where a party who is *not* in a contractual relationship with the government commences business in a regulated field which is subsequently affected by legislation, *see, e.g., Bowen v. Public Agencies Opposed to Social Sec. Entrapment* ("*POSSE*"), 477 U.S. 41 (1986); *Federal Housing Admin. v. Darlington, Inc.*, 358 U.S. 84 (1958); (2) cases involving contracts between private parties that are affected by subsequent legislation, *see, e.g., Norman v. Baltimore & O.R.R.*, 294 U.S. 240 (1935); and (3) cases involving valid contract rights between the government and another party that are subsequently affected by legislation, *see, e.g., Lynch v. United States*, 292 U.S. 571, 580 (1934); *Perry v. United States*, 294 U.S. 330, 351 (1935). Respondents' contracts fall into the third category of cases: when a private party acquires valid contract rights in a contract with the government, those rights survive subsequent legislation altering the government's contracting authority.

The first category of cases distinguishes between *expectations* that parties have because of then-existing law and *vested rights* that parties acquire through contract. For example, in *POSSE*, the case upon which the government places its greatest reliance, the Court rejected the contention that California's right of withdrawal from the federal social security system constituted property within the meaning of the Fifth Amendment. Although the parties had entered into an "agreement" that allowed California to unilaterally withdraw from the social security system, the Court held that the agreement merely restated the statutory language of the Social Security Act and conferred no vested right upon which California could assert a property interest. Congress, therefore, could enact legislation revoking states' then-existing rights to withdraw from the system without such actions constituting a taking under the Fifth Amendment. *POSSE*, 477 U.S. at 55.[2] *See also Darlington*, 358 U.S. at 91 (holding that under National Housing Act party did not possess "even a semblance of a contractual right rising to the dignity of the one involved in *Lynch*"). Unlike Respondents here, the parties in *POSSE* and *Darlington* did not possess vested contract rights as against the government, and thus, were vulnerable to regulatory changes.

The second category of cases involves contracts between private parties affected by subsequent legislation. Although the government does not make reference to these cases, it borrows a proposition cited often in cases of this type: contracts cannot impair the ability of Con-

---

[2] Significantly, unlike here, the Social Security Act expressly reserved to Congress the authority to alter not only its provisions, but any agreements entered into pursuant to the Act. *POSSE*, 477 U.S. at 51-52; *see* 42 U.S.C. § 1304 (1994) ("The right to alter, amend, or repeal any provision of this chapter is hereby reserved to the Congress.").

gress to legislate. (*See* Pet. Br. at 18.) While true, this proposition is anchored in cases involving contracts between *private* parties. For example, in *Norman*, Congress outlawed "gold clause" stipulations in all public and private contracts in order to regulate the currency of the United States. 294 U.S. at 311. In holding that Congress could invalidate provisions of existing contracts between private parties, the Court stated that "[p]arties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them." *Id.* at 308. However, the Court also stated that "[t]he Government's own contracts—the obligations of the United States—are in a distinct category and demand separate consideration. *See Perry v. United States*, decided this day." *Id.* at 306 (citation omitted).

Respondents' situation fits within the third category of cases illustrated by *Perry* and *Lynch*: valid contracts between the government and private parties that are subsequently affected by an act of Congress. As in *Norman*, the plaintiff in *Perry* contested Congress' nullification of the "gold clause" in all obligations. In *Perry*, however, the plaintiff possessed an obligation of the United States. The Court, noting this distinction, held that Congress could not abrogate an obligation of the government entered prior to the act of Congress:

> There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers.

Perry, 294 U.S. at 350-51. The Court recognized that if Congress has the ability to nullify already-existing obligations of the United States, a promise of the government would become nothing more than an "illusory pledge." *Id.* at 350; *see also Murray v. Charleston*, 96 U.S. 432, 445 (1877) ("It is against the rules, both of law and of reason, to admit by implication in the construction of a contract a principle which goes in destruction of it.").

In *Lynch*, the Court made clear the distinction between (1) rights created by contract, and (2) gratuities or privileges bestowed through acts of Congress. *Lynch* involved beneficiaries under war risk insurance policies issued by the United States during the First World War. The United States refused to make payments under the policies, arguing that an act of Congress had repudiated all laws pertaining to war risk insurance, including the right of beneficiaries to claim amounts due under the policies. The Court rejected the government's position, holding that the war risk insurance policies, as *contracts* with the United States, possessed fundamentally different legal incidents than *benefits* granted by Congress:

> Pensions, compensation allowances and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress. On the other hand War Risk policies, being contracts, are property and create vested rights. The terms of these contracts are to be found in part in the policy, in part in the statutes under which they are issued and the regulations promulgated thereunder.

Lynch, 292 U.S. at 577 (citations omitted). Significantly, as in *Perry*, the Court noted that the act authorizing the issuance of the policies, did not reserve to Congress the right to curtail the amount of benefits which the government had contracted to pay. *Id.* at 578.

Respondents here do not dispute the government's revocation of benefits or gratuities granted to them by Congress as part of a regulatory scheme. Rather, they seek the consideration, *i.e.*, the payment, promised to them in exchange for acquiring failing thrifts. To allow Congress to abrogate Respondents' valid contract rights

would run counter to the principle that "[t]he United States are as much bound by their contracts as are individuals." *Sinking-Fund Cases*, 99 U.S. 700, 719 (1879); *see Lynch*, 292 U.S. at 580 ("Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation.").

C. The Power To Legislate Does Not Include The Power To Destroy Vested Contract Rights

To avoid liability, the government relies upon the "unmistakability" and sovereign act doctrines. Neither excuse, however, shields the government from liability for the destruction of Respondents' vested rights.

1. *The Right To Terminate A Contract Due To A Change In Government Circumstances Must Be Specifically Reserved*

Throughout its history, the United States government has had the need to abrogate or terminate its contracts with private parties due to a change in circumstances. The issue is not whether the government can act in such a manner, but, rather, what are the consequences of such action. The rule of law is well-developed. Absent a contractual or statutory mechanism for compensating parties upon termination of their contracts, termination will constitute a breach. *See United States v. Spearin*, 248 U.S. 132, 138 (1918); *United States v. Behan*, 110 U.S. 338, 346-57 (1884); Beauregard, *Termination for Convenience as Breach of a Government Contract*, 7 B.C. Indus. & Com. L. Rev. 259 (1966) (recognizing that United States has "inherent and sovereign power to terminate a government contract;" in absence of statutory, regulatory or contractual basis such action considered breach of contract).

One of the most common historical examples of the government's abrogation of contracts due to changed circumstances are those contract terminations that occurred at the cessation of hostilities. Beginning with the Civil War, when the government terminated a contract that did not contain a termination clause, it was required to compensate the contractors for breach. In *United States v. Speed*, 75 U.S. (8 Wall.) 77 (1868), the government abrogated a contract for the packing and curing of pork for use as military provisions due to an increase in the price of hogs. This Court held that the government had breached its contract, had failed to include a termination clause which would have limited its damages, and therefore owed the contractors damages, including lost profits. The damages awarded were those permitted under the common law for breach of contract, without limitation.

In *Thompson v. United States*, 9 Ct. Cl. 187 (1873), the government entered into a contract for mules just prior to the end of the Civil War. At the end of the war, the government realized that it had a surplus of mules and ordered the contractors to stop shipment. Due to a surplus of mules on the open market, the contractors were unable to sell the mules for the amount the government had agreed to pay. The Court of Claims found a breach of contract and awarded the contractors the difference between the average sale price to the government and the amount for which the contractors were able to sell the surplus mules.

By the First World War, the government had a better sense of the perils of contract terminations due to the end of war. Thus, Congress passed various laws which established a mechanism to allow the government to terminate contracts without incurring liability for breach of contract. For example, the Urgent Deficiencies Appropriations Act empowered the President to cancel, suspend or requisition any contract so long as the government pro-

vided "just compensation" to the contractor whose contract rights were taken. 40 Stat. 182 (1917), *repealed by* Act of June 5, 1920, ch. 250, 41 Stat. 988. Absent this statutory authorization, the government would have been liable for breach of contract when it canceled contracts following the war.[3]

By the Second World War, the government had had extensive experience with contract abrogations due to changed circumstances and recognized the need to reserve the right to terminate contracts without incurring liability for breach of contract. Under the First War Powers Act, Pub. L. No. 77-354, 55 Stat. 828 (1941), Congress authorized the President to enter into contracts, as well as modify or amend contracts. The Attorney General determined that the Act permitted settlement of termination claims by negotiation. 40 Op. Att'y Gen. 53 (1942). Two years later, Congress passed the Contract Settlement Act of 1944, ch. 358, 58 Stat. 649 (principally codified as amended at 41 U.S.C. §§ 101-125 (1994)), which permitted cancellation of a contract upon payment of "fair compensation" to include the contractor's costs incurred in the terminated portion of the contract plus a reasonable amount for profit thereon. *See* Office of Contract Settlement, *A History of War Contract Terminations and Settlements*, 21-28 (July 1947).

By the end of World War II, recognizing that it could not avoid liability for terminating contracts, the United

[3] Congress, while limiting a contractor's right to recovery for abrogation of its contract, recognized that in doing so, it had taken vested rights for which it would have to provide just compensation. *See International Arms & Fuze Co. v. United States*, 101 Ct. Cl. 297 (1944) (stating that Urgent Deficiencies Appropriations Act was "a species of eminent domain," and termination of contracts under Act "was not a breach of contract by the Government, but was a taking, for the public benefit, of the contractor's rights under the contract"); *see also De Laval Steam Turbine Co. v. United States*, 284 U.S. 61 (1931); *Barrett Co. v. United States*, 273 U.S. 227 (1927); *Russell Motor Car Co. v. United States*, 261 U.S. 514 (1923).

States established mechanisms to process termination claims. These mechanisms have evolved into the termination for convenience clause that is required currently in government procurement contracts under the Federal Acquisition Regulations. *See G.L. Christian & Assocs. v. United States*, 312 F.2d 418, 426 (Ct. Cl.), *cert. denied*, 375 U.S. 954 (1963).

The history of war contract terminations demonstrates that the government must reserve the right to limit its obligations under terminated contracts by statute, regulation or contract. If the government fails to do so, it will be liable for a breach of contract or for a taking of vested rights.[4]

2. *The "Unmistakability Doctrine" Does Not Protect Against Abrogation Of Vested Rights*

The government's reliance on the concept it calls the "unmistakability doctrine" confuses the issues before the Court. Respondents here do not claim that their contracts prevented Congress from subsequently altering the regulatory framework concerning supervisory goodwill; nor do they assert that FSLIC and the FHLBB could preclude Congress from legislating. Rather, Respondents argue that Congress' withdrawal of FSLIC's authority to enter into contracts regarding the treatment of goodwill has abrogated their valid, pre-existing contract rights. The unmistakable terms requirement does not apply to this claim.

The roots of the unmistakable terms requirement can be found in cases where a party who is a recipient of a statutory benefit attempts to enjoin the use of the inherent powers of the sovereign. For more than 100 years, this

[4] When faced with both a breach of contract and a taking of vested rights, recovery on the contract theory generally precludes recovery under the Fifth Amendment. *Sun Oil Co. v. United States*, 572 F.2d 786, 818 (Ct. Cl. 1978) (stating when plaintiff bases alternative theories in contract and Fifth Amendment recovery under one precludes the other).

Court has distinguished cases involving statutory benefits from cases involving contractual rights. For example, where a party sought to prevent the state of Rhode Island from imposing a tax on banks, the Supreme Court found that where there was no express or implied promise to tax the bank "[t]he relinquishment of such a power is never to be assumed." *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514, 561 (1830). Therefore, the tax was upheld. *Id.*

In contrast, in *Jefferson Branch Bank v. Skelly*, 66 U.S. (1 Black) 436 (1861). a bank was successful in enjoining the taxing power of the state. The Court stated that no surrender of any power of sovereignty is effective "unless such surrender has been expressed in terms too plain to be mistaken." *Id.* at 446. In *Jefferson*, the Court held that the charter granted to the bank which explicitly stated that the state would accept a certain percentage of dividends in lieu of any tax to which the bank might otherwise be subject was a contract. Subsequent legislation which increased taxes on the bank was deemed a violation of the contract. Therefore, the bank was not subject to the additional tax. The Court's analysis of whether the government had waived its right to tax the bank depended on the determination that the bank had obtained a valid contract right.[5]

This ancient distinction between gratuitous benefits and vested contract rights was recently restated by the U.S.

[5] Where the relief sought is an injunction against the sovereign's authority to legislate, heightened scrutiny is required to protect the powers of the sovereign. It is in this context that courts have required a showing that the government has expressed its intention to waive its sovereign power to legislate in unmistakable terms. *See Providence*, 29 U.S. at 560. The whole community has an interest in maintaining the sovereign power intact as against individuals; therefore, this Court has understandably been very cautious in finding that the government has contracted to relinquish its powers. *See Jefferson*, 66 U.S. at 447-48; *see also Providence*, 29 U.S. at 561.

Court of Appeals for the Federal Circuit in *Hughes Communications Galaxy, Inc. v. United States*, 998 F.2d 953 (Fed. Cir. 1993) and *American Satellite Co. v. United States*, 998 F.2d 950 (Fed. Cir. 1993). Both *Hughes* and *American Satellite* involved contracts between private parties and the National Aeronautics and Space Administration ("NASA") under which NASA was to use its best efforts to provide launch services via the space shuttle program. The court held that in the face of contract language stating that the contract would be performed in accordance with a specific policy of the United States, the United States could not avoid its contractual obligation by the expedient of changing that policy. *See Hughes*, 998 F.2d at 958; *American Satellite*, 998 F.2d at 952-53. The court found that the reference to the policy in effect on a given date "more than satisfie[d] the 'unmistakable terms' requirement." *Hughes*, 998 F.2d at 958.

Like *Hughes* and *American Satellite*, Respondents' contracts involve specific contractual promises that were negotiated at arm's length. The contracts specified the exact terms under which the parties would operate for an agreed-upon period of time. These terms embodied the consideration paid to the Respondents in lieu of financial assistance. They are unambiguous and must be enforced.

Taken to its extreme, the government's argument illustrates why it is ridiculous to apply the so-called unmistakability doctrine to vested contract rights against the government when a party is seeking damages for the denial of those rights. Under the government's theory, those who contract with the government would be forced not only to negotiate and expressly set forth each and every term of their contracts; they would be required to anticipate all potential changes in the law which would have an impact on contract terms and state that each term would survive such a change. This, of course, is

impossible, because Congress could then legislate that material term out of existence thereby rendering every contract with the United States illusory. Moreover, this is not what the law requires. If the government wants to retain the right to modify or terminate a contract, it must state so in the contract. In this sense, it is the right reserved to alter the contract that must be stated in unmistakable terms.

3. *The Sovereign Act Doctrine Has Limited Application*

The sovereign act doctrine protects the government from liability for "public and general" acts taken in its sovereign capacity. *Horowitz v. United States*, 267 U.S. 458, 461 (1925). In order for the sovereign act doctrine to apply, the act must be in the public interest and must be of general, not specific, application. *Air Terminal Servs., Inc. v. United States*, 330 F.2d 974, 981 (Ct. Cl. 1964) (Jones, C.J., dissenting). But, "[a]cts that are motivated primarily by a desire to save money do not provide a defense [under the doctrine]." *Hughes Communications Galaxy, Inc. v. United States*, 26 Cl. Ct. 123, 141 (1992), *rev'd on other grounds*, 998 F.2d 953 (Fed. Cir. 1993); *accord Freedman v. United States*, 320 F.2d 359 (Ct. Cl. 1963).

The legislative history of FIRREA bears out the lower courts' findings that FIRREA targeted the contracts at bar. It is replete with statements of concern for the public fisc. *See, e.g.*, H.R. Rep. No. 54(V), 101st Cong., 1st Sess. 24-25 (1989), *reprinted in* 1989 U.S.C.C.A.N. 397, 407-09; 135 Cong. Rec. H2565 (daily ed. June 14, 1989) (statement of Rep. Saxton that goodwill agreements were "a mistake"); *Guaranty Fin. Servs.*, 928 F.2d at 1004-06 (providing discussion on purpose of FIRREA, congressional targeting of forbearance agreements). *See also Winstar Corp. v. United States*, 64 F.3d 1531, 1550 (Fed. Cir. 1995) (discussing congressional knowledge of

FIRREA's breach of the contracts), *cert. granted*, 133 L. Ed. 2d 753 (1996). The legislative history demonstrates that Congress was unhappy with the terms of the contracts it had entered and sought to escape these terms through legislation. The government may not claim the protection granted the sovereign when it is using its position as sovereign to breach its own contract.

Even if the enactment of FIRREA is found to constitute a sovereign act, that finding does not foreclose government liability. The fact that liability is triggered by a sovereign act is irrelevant to the issue of compensation. *Hughes*, 998 F.2d at 959. When a contract with the government contains a clear promise to act or refrain from acting, breach of the promise by a sovereign act is compensable. Peter S. Latham, *The Sovereign Act Doctrine in the Law of Government Contracts: A Critique and Analysis*, 7 U. Tol. L. Rev. 29, 44-45 (1975) (discussing specificity of government promise and citing cases). The promise to act or refrain from acting may be either express or implied. *Id.* at 41; *see, e.g., Gerhardt F. Meyne Co. v. United States*, 76 F. Supp. 811 (Ct. Cl. 1948) (warranty when contract stated specific road available for use, however, military had closed road); *D & L Constr. Co. v. United States*, 402 F.2d 990 (Ct. Cl. 1968) (when contract specified means of egress, it warranted access). It does not have to be stated in unmistakable terms.

All three contracts at issue involve agreements which contained express, unconditional language on the accounting treatment of goodwill. *Cf. Guaranty Fin. Servs.*, 928 F.2d at 999 (agreement warned that obligations of parties might change with subsequent changes to regulations). When Congress passed FIRREA, it precluded such treatment of supervisory goodwill. Having done so, the government has breached an express promise to act in a certain way. It, therefore, must pay for its breach. *United States v. Bostwick*, 94 U.S. (4 Otto) 53, 69 (1876) (govern-

ment lease of premises contained implied promise to remunerate for damages to building); *Sunswick Corp. v. United States*, 75 F. Supp. 221 (Ct. Cl.), *cert. denied*, 334 U.S. 827 (1948) (directive to contractor requiring wage rates higher than those specified in contract was compensable because action deprived contractor of specific contractual promise).[6]

The government's conduct is analogous to accepting delivery of airplanes or ships ordered during a war and refusing to pay because the war ended the day after delivery. It forces Respondents—thrifts that were not part of the savings and loan crisis, but that responded to the government's call to fix the problem—to assume the public burden of Congress' misjudgment. Respondents must be compensated for the destruction of the rights they acquired in consideration for their assumption of this burden.

II. CITIZENS MUST BE COMPENSATED FOR THE DESTRUCTION OF VESTED RIGHTS

Courts have long recognized that the government cannot unilaterally abrogate its contracts with private parties without the payment of compensation. A variety of common law theories and constitutional principles protect those who possess valid contract rights against the United States. Each of these theories requires the government to compensate those with whom it contracts when the government no longer chooses to perform and each is potentially applicable to the government's conduct in this case.

---

[6] Even if this Court does not find that a "compensable" sovereign act exists, the contractors are not foreclosed from recovery. The sovereign act doctrine does not immunize the government from its duty to provide just compensation under the Fifth Amendment. *See Wah Chang Corp. v. United States*, 282 F.2d 728 (Ct. Cl. 1960) (sovereign act that effects taking of property is compensable); *Seatrain Lines, Inc. v. United States*, 99 Ct. Cl. 272, 315 (1943) (every breach of contract by government also implicates taking of vested rights protected under Fifth Amendment).

A. Breach Of Contract Provides Compensation For The Denial Of Vested Contract Rights

When the federal government enters into contracts, it ordinarily possesses rights and incurs responsibilities similar to those of a private person who is a party to the contract. *Perry*, 294 U.S. at 352 ("There is no difference . . . except that the United States cannot be sued without its consent.") (citation omitted). One such responsibility of the government as a contracting party is to provide compensation for breach of vested contract rights. If the United States repudiates its contractual obligations "it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen." *Sinking-Fund Cases*, 99 U.S. at 719. As a result, when the United States breaches a contract the non-breaching party is entitled to the damages and remedies afforded by the common law.

The underlying purpose in awarding breach of contract damages is to "place the injured party in as good a position as he or she would have been had the breaching party fully performed." *Estate of Berg v. United States*, 687 F.2d 377, 379 (Ct. Cl. 1982); *accord Restatement (Second) of Contracts* § 344(a) (1981) (these are damages which protect a non-breaching party's "expectation interest"); McCormick, *Handbook on the Law of Damages* § 137 (1935); W. Jaeger, *Williston on Contracts* § 1338 at 198 (3d ed. 1968). Breach of contract damages include the natural and probable consequences of the breach. *Ramsey v. United States*, 101 F. Supp. 353, 357 (Ct. Cl. 1951), *cert. denied*, 343 U.S. 977 (1952); *accord* W. Jaeger, *Williston on Contracts* § 1344 at 226 (3d ed. 1968). The non-breaching party may also recover special or consequential damages such as lost profits if such damages were reasonably foreseeable at the time the parties entered into the contract. *Id.* at 227-28.

As an alternative to recovery of one's expectation interest, a non-breaching party has the right to damages

based on its "reliance interest," *i.e.*, the "interest in being put in as good a position as he would have been in had the contract not been made." *Restatement (Second) of Contracts* § 344 (1981). Such damages include "expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed." *Id.* § 349.

Respondents are entitled to either the expectation measure or the reliance measure of damages for the United States' breach of contract. Under the expectation measure, Respondents are entitled to the full economic benefit that they would have received had the government fully performed. Determination of the full economic benefit must take into account the fact that, if the government had honored its bargain, the thrift owners would have been able to build greater assets with less contributed capital, and achieve earnings through the use of leverage. *See Wells Fargo Bank, N.A. v. United States*, 33 Fed. Cl. 233, 236-37 (1995) (discussion of how financial institutions create earnings through leveraging). Respondents lost this leveraging opportunity and resulting earnings because the thrifts were either forced out of business, or forced to reduce their assets as a result of the government's breach of its agreements.

Alternatively, under the reliance measure of damages, Respondents are entitled to be put in as good a position as they would have been had the contracts not been made. These damages would include, at a minimum, the financial investments that the thrift owners made, initially in reliance on the government's promises, and later to protect themselves after the government breached its promises.

B. A Takings Claim Provides Compensation For Denial Of Any Property Right, Including Vested Contract Rights

1. *The Destruction Of Respondents' Vested Contract Rights By The Enactment Of FIRREA Is A Taking Within The Meaning Of The Fifth Amendment*

Valid contract rights are also protected by the Fifth Amendment. The Just Compensation Clause of the Fifth Amendment "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); U.S. Const. amend. V. Vested contract rights are property within the meaning of the Fifth Amendment. *Lynch*, 292 U.S. at 579. This Court has found compensable takings not only when the government appropriates a contract, but also where the contract survives but its value is destroyed. *Brooks-Scanlon Corp. v. United States*, 265 U.S. 106 (1924) (appropriation of contract is a taking); *Armstrong*, 364 U.S. at 48 (action rendering valid liens unenforceable satisfies every element of a Fifth Amendment taking).

The determination of whether a taking has occurred is a factual inquiry—the key factor being the extent to which government action has interfered with an individual's reasonable investment-backed expectations. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). For example, in *Ruckelshaus*, Congress amended provisions of a statute that required submission of data containing trade secrets, providing confidentiality and exclusive use of the data by the company who submitted it. 467 U.S. at 992. Congress later amended those provisions again to allow data to be disclosed after a certain time had passed. *Id.* at 994. This Court held that if the agency were to disclose data submitted by Monsanto dur-

ing the time when the statute explicitly guaranteed confidentiality and exclusivity, government disclosure of such data would constitute a taking. *Id.* at 1011.

The Court found that Monsanto had submitted the data in accordance with a statutory scheme under which "the Federal Government had explicitly guaranteed . . . an extensive measure of confidentiality and exclusive use. This explicit governmental guarantee formed the basis of a reasonable investment-backed expectation." *Id.* Even though Monsanto had given no consideration for the protections conferred by the statute, a breach of the government's unilateral promise regarding the treatment of its property was sufficient to constitute a taking.

The instant case presents an even more compelling argument for Fifth Amendment protection. Here, the government's promises were part of a *bilateral* agreement for which Respondents gave consideration. If a statutory scheme which is subject to change at any time is sufficient to establish reasonable investment-backed expectations, then certainly where the government makes specific contractual promises to a private individual, it induces a reasonable expectation that it will fulfill those promises. The destruction of the value of those promises entitles the contractor to compensation under the Fifth Amendment.

2. *Respondents Are Entitled To Compensation To Place Them In The Position They Would Have Been Had The Taking Not Occurred*

In awarding compensation for a Fifth Amendment taking, this Court has sought to put the claimant "in as good a position pecuniarily as if his property had never been taken." *Olson v. United States*, 292 U.S. 246, 255 (1934). Where tangible property is taken, this value is often set at the fair market value of the property at the time of the taking. *United States v. Miller*, 317 U.S. 369, 374 (1943). Under this standard, the owner of the property receives what a "willing buyer would pay in cash to

a willing seller." *Id.* There is no set formula for establishing what amount of compensation is just. *United States v. Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 402 (1949). Principles of equity must inform the determination. *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950).

Where the government has appropriated an entire contract just compensation has been fixed at the amount a willing buyer would have paid to a willing seller for an assignment of contract rights. *De Laval Steam Turbine Co. v. United States*, 284 U.S. 61, 72 (1931); *Brooks-Scanlon*, 265 U.S. at 123-24. One of the key factors to be considered in fixing this amount is the anticipated profitability of the contract if fully performed. *De Laval*, 284 U.S. at 72.

In the instant case, the government has deprived Respondents of certain rights under their contracts resulting not only in the destruction of the contracts' value, but a loss of the value of Respondents' ongoing business.[7] In these circumstances, Respondents are entitled to recover the value of the businesses that were destroyed. This value may include certain intangibles. *Kimball Laundry Co. v. United States*, 338 U.S. 1, 9-10 (1949). In *Kimball*, the Army took over a laundry for a period of three years. The government reimbursed the owner for the use of the property but refused to compensate the business for the loss of its established customer base. This Court held that the going concern value, although difficult to quantify, was part of what was taken. " 'In determining the value of a business . . . the good will and earning power due to effective organization are often more important elements than tangible property.' " *Id.* at 11 (quoting *Galveston Elec. Co. v. Galveston*, 258 U.S. 388, 396 (1922)).

---

[7] Two of the Respondents were immediately thrown into receivership following the passage of FIRREA while the other suffered severe economic hardship, and was unable to enjoy the benefit of the bargain it had struck with the government.

These precedents establish the nature of the reimbursement to which Respondents are entitled. Respondents are entitled to be put in the position they would have occupied had they been allowed to continue using the bargained-for accounting treatments. *See Olson*, 292 U.S. at 255. First, the logical starting point for valuation of Respondents' lost property is the amount that Respondents invested to acquire the thrifts and the amounts they have invested since acquisition in an effort to turn the thrifts into profitable ventures. Second, improvements in the financial position of the thrifts during the time they were operated by Respondents must be added to the initial value at the time of acquisition. Third, the anticipated profitability of the thrifts over the life of the negotiated agreements also made the contract rights more valuable. Finally, Respondents have been stripped of their ability to operate their thrifts, and the going concern value of their businesses now lies in the hands of the government. For taking this intangible property right, the government also must compensate Respondents.

C. Frustration Of Purpose Allows A Citizen To Rescind The Contract And Obtain Restitution

Valid contract rights are also protected under the common law doctrine of frustration of purpose. Under that doctrine, "[a] party may discharge a contract when its primary purpose has been destroyed by a supervening event that the parties assumed would not occur." *Resolution Trust Corp. v. Federal Sav. & Loan Ins. Corp.*, 25 F.3d 1493, 1503 (10th Cir. 1994); *accord Restatement (Second) of Contracts* § 265 (1981); *Everett Plywood Corp. v. United States*, 651 F.2d 723, 728-29 (Ct. Cl. 1981).

The frustration of purpose doctrine is properly applied where subsequent legislation has undermined the fundamental terms of a contract. For example, in *Resolution Trust*, investors in a savings and loan association

claimed that, following the passage of FIRREA, the FDIC and Office of Thrift Supervision had breached the government's contract to treat supervisory goodwill and the value of a subordinated debenture owed to the FSLIC as regulatory capital. The investors sought rescission and restitution.

The United States Court of Appeals for the Tenth Circuit found that the investors were entitled to the requested relief under the doctrine of frustration of purpose. According to the court, "[a]pplication of FIRREA's capitalization requirements to [the new institution] made it impossible for the Investors to fulfill their contract duty to operate the thrift in compliance, thus totally frustrating their purpose and warranting discharge of their agreement to acquire the thrift." 25 F.3d at 1503. The court then upheld the award of restitution of the cash invested at the time of the acquisition.[8]

Remedies for restitution and rescission are not limited to actual investment. The purpose of rescission and restitution is to place a non-breaching party "in as good a position as it enjoyed before the contract was made" by requiring the breaching party to restore the value of the non-breaching party's part performance or reliance. *Resolution Trust Corp.*, 25 F.3d at 1504. Thus, a party whose duty is discharged as a result of frustration of purpose is entitled to restitution for any benefit that it has conferred

---

[8] *See also Winstar Corp. v. United States*, 994 F.2d 797, 818 (Fed. Cir. 1993) (Newman, J., dissenting) (when a contract with the government is no longer capable of performance on its agreed terms, whether because of legislative or agency action or Act of God, available relief may include rescission and restitution in cases of impracticability and frustration of contractual purpose), *vacated mem.* No. 92-5614 (Fed Cir. Aug. 18, 1993); *Far W. Fed. Bank, S.B. v. Director, Office of Thrift Supervision*, 787 F. Supp. 952, 960-61 (D. Or. 1992) (thrift's investors were entitled to rescission and restitution under doctrines of frustration of purpose and impossibility of performance where enactment of FIRREA precluded government from honoring agreement).

on the other party by way of part performance or reliance. *Restatement (Second) of Contracts* § 377 (1981); C. Friend, *Actions and Remedies* § 4:23 (1987).

The proper measure of restitution depends on the circumstances of the case. Recovery may be measured as the reasonable value of what the defendant received "in terms of what it would have cost him to obtain it from a person in the claimant's position." *Resolution Trust Corp.*, 25 F.3d at 1505; *Restatement (Second) of Contracts* § 371(a) (1981). The amount may also be measured by the extent to which the defendant's property has increased in value or other interests advanced by the plaintiff's part performance. *Restatement (Second) of Contracts* § 371(b) (1981); *see also* W. Jaeger, *Williston on Contracts* § 1485 at 304-05 (3d ed. 1968) (where party's failure to fulfill completely its contract obligations is due to other party's default, alternative measures of restitution include the amount it would have cost to obtain part performance from other source, or amount by which the defaulting party has been enriched by part performance).

Under these principles, Respondents may be entitled to a wide range of restitutionary damages. First, Respondents are entitled to recoup any investments they made in their institutions. Second, Respondents' recovery may be measured as the reasonable value of what the United States received. A measure of this value is what it would have cost the United States out of the FSLIC insurance fund to bail out the failing thrifts acquired by Respondents, or the cost of inducing another investor to take over the failed thrifts, presumably at a cost considerably higher than Respondents' initial investments.

D. The Public Debt Clause Protects Those Who Have Delivered Services To The United States

Respondents' valid contract rights are protected by the Public Debt Clause of the Fourteenth Amendment. The

Public Debt Clause states that "the validity of the public debt of the United States, authorized by law, . . . shall not be questioned." U.S. Const. amend. XIV, § 4. Respondents have performed the services required under their agreements with the government, thereby establishing a government duty to provide the compensation it promised. The duty to provide compensation is a debt of the United States. The government cannot now question and refuse to honor those debts by the expedient of passing legislation prohibiting their satisfaction.

The Public Debt Clause protects the integrity of all public obligations. *Perry*, 294 U.S. at 354. In *Perry*, the petitioner had purchased a United States bond issued in support of the World War I effort that was payable in gold coin. Congress later passed a resolution declaring that payment in gold coin was against public policy, and therefore, all obligations of the United States would be discharged in legal tender. The resolution significantly reduced the value of the petitioner's bond. *Id.* at 347.

This Court held that in attempting to override the bond obligation, Congress went beyond its power. *Id.* at 354. The Court noted that although the Public Debt Clause was initially inspired by the desire to guarantee the obligations incurred by the government during the Civil War, the language of the clause is not narrowly drawn. *Id.* at 354. Therefore, the Court stated there was no reason not to construe the clause as "embracing whatever concerns the integrity of the public obligations." *Id.* Thus, the clause was found applicable to the World War I obligations in *Perry*.

Respondents, similar to the bondholder in *Perry*, contracted with the government to invest private funds to extinguish public debt. FSLIC "borrowed" these funds from Respondents and in partial "security" for the loans agreed to specific accounting treatments. This investment of private funds to aid the government in dealing with the savings and loan crisis is little different from

the investment made by bond purchasers in support of a war effort. The government is no more free to repudiate its obligations to Respondents than it is to alter the terms of its bond repayment obligations.

Congress may change its regulatory scheme prospectively, but it may not abrogate a party's vested rights against the government. As this Court has stated:

> No one disputes that Congress may prospectively reduce [entitlements] . . . . It is quite a different matter, however, for Congress to deprive [a person] of pay due for services already performed, but still owing. In that case, the congressional action would appear in a different constitutional light.

United States v. Larionoff, 431 U.S. 864, 879 (1977) (citations omitted).

Respondents entered valid contracts with the government under which they invested their own funds. In partial satisfaction of its obligations under the agreements the government pledged to allow Respondents to utilize certain accounting treatments. Respondents satisfied their obligations by acquiring failing thrifts and saving the government hundreds of millions of dollars. Congress later determined that its merger program was not alleviating the thrift crisis and sought to change the regulatory scheme as an alternative approach to easing the government's financial burden. Thus, even though it received the benefit of its bargain, the United States refused to honor its obligations and satisfy the debt established by Respondents' performance. As this Court stated in *Larionoff*, Congress' actions must be evaluated in that light.

Where the government seeks to alter or repudiate its obligations by questioning a public debt, it is liable for breach of contract damages. *Perry*, 294 U.S. at 354. Therefore, in order to be made whole, the government must place Respondents in the position they would have occupied but for the violation of the Public Debt Clause.

They are entitled to receive the benefit of their bargains. In order to be made whole, the government must compensate Respondents for all damages flowing from the failure of the United States to allow Respondents to continue using these accounting treatments, including anticipated profits and the loss of the value of their businesses.

CONCLUSION

For the reasons stated above, the Chamber of Commerce of the United States of America respectfully requests the Court to affirm the decision of the Federal Circuit.

Respectfully submitted,

HERBERT L. FENSTER *
TAMI LYN AZORSKY
JULIE M. WILLIAMSON
MARK A. ROWLAND
MARGARET C. RHODES
HUGO TEUFEL, III
McKENNA & CUNEO, L.L.P.
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-7500

ROBIN S. CONRAD
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Attorneys for Amicus Curiae The Chamber of Commerce of the United States of America

March 29, 1996

* Counsel of Record

FOR ARGUMENT

No. 95-865

(13)

Supreme Court, U.S.
FILED
MAR 29 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA,

Petitioner,

vs.

WINSTAR CORPORATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF AMICUS CURIAE OF WESTERN FEDERAL SAVINGS AND LOAN ASSOCIATION AND WESTFED HOLDINGS, INC. IN SUPPORT OF RESPONDENTS

DENNIS A. WINSTON
NELSON E. BRESTOFF
BRESTOFF & WINSTON
Attorneys for Amicus Western Federal Savings and Loan Association and WestFed Holdings, Inc.
1620 26th Street, Suite 2000N
Santa Monica, California 90404
(310) 582-8200

8589
Lutz Appellate Services, Inc.
BEST AVAILABLE COPY
31pp

TABLE OF CONTENTS

	Page
Table of Citations	ii
Statement of Interest	1
Introduction and Summary of Argument	2
Argument	5
I. Thrift Mergers Were Negotiated Transactions Authorized By Congress, Supported By Mutual Consideration, For The Financial Benefit Of Both Parties: They Were Contracts.	5
A. The Government Faced A Potentially Catastrophic Thrift Crises In The 1980s.	6
B. The Government Authorized And Encouraged Thrift Mergers As A Less Expensive Means Of Resolving Troubled Thrifts.	7
C. The Recognition Of Supervisory Goodwill In Thrift Mergers Was An Essential Component Of The Contractual Consideration From The Government.	11
II. The Government Is Liable For Damages When It Repudiates Financial Agreements To Which It Is A Party.	14

Page

III. The Sovereign Acts Doctrine Does Not Preclude Respondents' Claims Because The Abrogation Of The Specific Contracts Was Effected By The Adoption And Implemention Of Provisions In FIRREA Intended To Repudiate These Contracts. 20

Conclusion 24

TABLE OF CITATIONS

Cases Cited:

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) 22

Bowen v. Public Agencies Opposed to Social Security Entrapment (POSSE), 477 U.S. 41 (1986) 14, 18, 19, 20

De La Rama Steamship Co. v. United States, 344 U.S. 386 (1952) 16

Gerhardt F. Meyne Co. v. United States, 76 F. Supp. 221 (1948), *cert. denied*, 334 U.S. 827 21

Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398 (1934) 18

Horowitz v. United States, 267 U.S. 458 (1925) 20

Hughes Communications Galaxy, Inc. v. United States, 998 F.2d 953 (Fed. Cir. 1993) 18

Page

Lynch v. United States, 292 U.S. 571 (1934) ... 3, 14, 16, 21, 22

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 18

Ottinger v. United States, 88 F. Supp. 881 (Ct. Cl. 1950) 21

Perry v. United States, 294 U.S. 330 (1935) ... 3, 14, 15, 16, 22

Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) 18

Resolution Trust Corp. v. Federal Sav. & Loan Ins. Corp. (Resolution Trust), 25 F.3d 1493 (10th Cir. 1994) 11, 21, 22, 23

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) 18

Sinking Fund Cases, 99 U.S. 700 (1878) 15

Sun Oil Co. v. United States, 572 F.2d 786 (1978) 21

Sunswick Corp., of Del. v. United States, 75 F. Supp. 221 (1948), *cert. denied*, 334 U.S. 827 21

Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969) 17, 23

United States v. Bostwick, 94 U.S. 53 (1876) 13

Contents

	Page
United States v. Gaubert, 449 U.S. 315 (1991)	14
United States Trust Co. of New York v. New Jersey (U.S. Trust), 431 U.S. 1 (1976)	3, 12, 13, 14, 17, 18, 19
Statutes Cited:	
7 U.S.C. § 136, *et seq.*	18
12 U.S.C. § 1464(t)(3)(A)	21
12 U.S.C. § 1464(t)(7)	23
12 U.S.C. § 1464(t)(8)	23
12 U.S.C. § 1464(t)(9)(B)	21
12 U.S.C. § 1725(c)(3)	8
12 U.S.C. § 1729(f)(1)	8
12 U.S.C. § 1729(f)(2)(A)	8
12 U.S.C. § 1730h(d)	8
Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989)	1, 4

Contents

	Page
United States Constitution Cited:	
Article I, section 10, clause 1	17
Other Authorities Cited:	
H.R. Rep. No. 54, 101st Cong., 1st Sess., pt. 1, (House Report) (1989), *reprinted in* U.S. Code Cong. & Admin. News 87,100	7
H.R. Rep. No. 54(I) 101st Cong., 1st Sess. 298, *reprinted in* 1989 U.S. Code Cong. & Admin. News at 293	22
Senate Report No. 19, 101st Cong., 1st Sess. 2 (1989)	7
12 C.F.R. § 567.1(w)	23
James Barth, *The Great Savings and Loan Debacle* 31 (AEI Press 1991)	6, 8, 10
James Barth and Dan Brumbaugh, Jr., *The Rough Road From FIRREA To Deposit Insurance Reform*, 2 Stan. L. & P. Rev. 61 (1990)	7, 10
William K. Black, *Ending Our Forebearers' Forbearances: FIRREA and Supervisory Goodwill*, 2 Stanford Law & Policy Review (Stan. L. & P. Rev.) 102 (1990)	6, 9, 10
Lewis Carroll, *Through the Looking-Glass* (Signet) 186	3

Contents

	Page
Michael S. Helfer and William Richardson, Jr., *Goodwill and Government Promises*, 2 Stan. L. & P. Rev. 118 (1990)	9, 18
Richard T. Pratt, *Competition And Condition In The Financial System*, Hearings before the Senate Committee on Banking, Housing and Urban Affairs, 97th Cong. 1st Sess. 96 (April 28, 1990)	6
Thomas Romer and Barry R. Weingast, *Congress: The Genesis of the Thrift Crises*, 2 Stan. L. & P. Rev. 37 (1990)	6, 7
Seidman Suggests Nurturing Marginal Thrift Back to Health, United States League of Savings Institutions Washington Notes 44(5): 4, 5 (February 2, 1990) ...	18
Wm. Shakespeare, *Macbeth*, Act V, Scene 8	24
David B. Toscano, Note, *Forbearance Agreements, Invalid Contracts For the Surrender of Sovereignty*, 92 Columbia Law Review 426 (1992)	22

BRIEF AMICUS CURIAE OF WESTERN FEDERAL SAVINGS AND LOAN ASSOCIATION AND WESTFED HOLDINGS, INC. IN SUPPORT OF RESPONDENTS

Western Federal Savings and Loan Association (Western Federal) and WestFed Holdings, Inc. (collectively referred to as "WestFed") submit this brief as Amicus Curiae in support of respondents Winstar Corporation, United Federal Savings Bank, Statesman Savings Holding Corp., The Statesman Group, Inc. ("Statesman") and American Life and Casualty Insurance Company, and Glendale Federal Bank, FSB.

STATEMENT OF INTEREST

Western Federal was, until its seizure by federal regulators on June 4, 1993, a federal stock savings association headquarted in Marina del Rey, California, and was a wholly-owned subsidiary of WestFed Holdings, Inc. Western Federal was created on September 23, 1988 as a result of a merger with the seized Bell Savings and Loan Association ("Bell") which had been seized by federal regulators in 1985. Pursuant to the merger agreement with the government, WestFed was required to infuse $20 million in cash into Western Federal. The government purchased stock amounting to 25% of WestFed's outstanding capital shares and purchased 150,000 shares of WestFed's senior preferred stock. Western Federal was also permitted to recognize supervisory goodwill (representing Bell's negative net worth). As of the end of 1989, Western Federal's net worth was $204.4 million, with total assets of approximately $4.8 billion.

With the passage of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183 (1989), Western Federal was ultimately unable to meet the newly enacted capital standards without reliance upon the contractually agreed upon supervisory goodwill. Western Federal was seized in June of 1993.

WestFed is one of the several cases currently pending in the United States Court of Federal Claims, three of which are represented by respondents before this Court. Amicus WestFed submits this brief in support of respondents to assist the Court's appreciation of the perspective of the saving and loan industry as to thrift mergers created prior to the enactment of FIRREA which included the recognition of supervisory goodwill and capital credits.

Thrift mergers were financial transactions, supported by mutual consideration, which were authorized, encouraged and facilitated by the Federal Home Loan Bank Board and its insurance arm, the Federal Savings and Loan Insurance Corporation (FSLIC). Thrift mergers operated to the financial benefit of the government which saved the cost of seizing and liquidating ailing thrifts. Between 1980 and 1988, regulators arranged more than 800 thrift mergers.

Amicus WestFed appreciates the magnitude of the claims currently pending on behalf of respondents and the remaining institutions in the Court of Federal Claims. However, those finite claims pale in comparison to the value of the government's word in participating in, as well as regulating, this country's $7 trillion economy. The broader principles involved in the matters before this Court dwarf the claims of merged thrifts.

INTRODUCTION AND SUMMARY OF ARGUMENT

> "When I use a word," Humpty Dumpty said,
> in rather a scornful tone, "it means just what
> I choose it to mean — neither more nor less."
>
> "The question is," said Alice, "whether you
> can make words mean so many different
> things."

> "The question is," said Humpty Dumpty,
> "which is to be master — that's all."

Lewis Carroll, *Through the Looking-Glass* (Signet) at 186.

Fundamentally, the government proffers two contentions which cannot both be true simultaneously. At once, the government maintains that a sovereign will not be held to have contracted to limit its powers unless it does so in unmistakable terms, then, the government contends the sovereign always retains the right to adopt new laws regardless of their impact on prior contracts. The government thus contends it always possesses the right to redefine or repudiate its obligations, regardless of any agreements it previously solemnized. The government cannot make its words do so many different things.

The government's same arguments were made to and rejected by this Court over sixty years ago in *Perry v. United States*, 294 U.S. 330 (1935), and in *Lynch v. United States*, 292 U.S. 571 (1934), and nearly twenty years ago in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977). The sovereign is not the unrestrained arbiter of the meaning of its word when given in contracts with private parties. This Court has marked a distinction between the government's obligations when it enters into negotiated financial agreements, supported by mutual consideration, on the one hand, and the government's power as sovereign when passing general legislation regulating the burdens and benefits of economic life, on the other. The government has traditionally been held to its word when entering into financial agreements with private parties; the unmistakability doctrine is not a talisman preventing liability for breach of such agreements.

In the matters now before this Court, the government authorized, encouraged and contracted for mergers of healthy savings and loan associations ("thrifts") with failing thrifts as a

financially beneficial method of resolving the burgeoning problems of a troubled industry. In the 1980s, thrift mergers benefitted the government by saving billions of dollars which would have been spent in liquidating failed thrifts. Thrift mergers were negotiated transactions, authorized by Congress, extensively reviewed and expressly approved by regulators, and heavily documented by the parties and their counsel. In exchange for the infusion of private capital, the government often contributed funds (as with United Federal Savings Bank (Winstar) and Statesman Bank for Savings (Statesman)) and agreed to define "goodwill" (basically, the difference between the book value of the acquired thrift's assets and the purchase price the government negotiated) as one of the benefits of the bargain to the healthy thrift.

In late 1989 and early 1990, the government reneged on the consideration it promised for the mergers, and repudiated its contracts through the adoption and specific implementation of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183 (1989). Respondents and scores of other thrifts then filed breach of contract and taking claims which are currently pending in the United States Court of Federal Claims.

Amicus seeks to provide the Court with a broader perspective of the savings and loan industry, as well as the scope and nature of the over 800 thrift mergers arranged by the government between 1980 and 1988. Amicus was one of these supervisory mergers, whose transaction was completed in October 1988, less than a year before FIRREA was considered or enacted.[1] Thrift mergers were not simply realignments mandated

1. Amicus' transaction was akin to Stateman's, but went one significant step further. In Amicus' transaction, the FSLIC became one of Amicus' shareholders. Notwithstanding the government's financial interest in the
(Cont'd)

by regulators. Mergers were negotiated contracts with the government, and provided, as structured, a substantial financial benefit both to the government and to the merged thrifts. Mergers were financial agreements which the government may not repudiate at its pleasure.

Finally, the immunity from liability enjoyed by the sovereign when it enacts public and general legislation which incidentally impairs private contractual rights does not preclude respondents' claims, either because FIRREA specifically abrogated the contracts, or because the Office of Thrift Supervision (OTS), when it exercised its discretion in implementing FIRREA, did so. The sovereign acts doctrine does not sanction the specific abrogation of existing contractual rights.

ARGUMENT

I.

THRIFT MERGERS WERE NEGOTIATED TRANSACTIONS AUTHORIZED BY CONGRESS, SUPPORTED BY MUTUAL CONSIDERATION, FOR THE FINANCIAL BENEFIT OF BOTH PARTIES: THEY WERE CONTRACTS.

Throughout the 1980s, the government attempted to stem the rising tide of thrift failures through several means, one of which was to encourage healthy thrifts to merge with failing ones to avoid the higher cost of seizing and liquidating the troubled institutions. Mergers were negotiated transactions, supported by

(Cont'd)
venture, Amicus failed certain regulatory tests almost immediately after FIRREA was passed. When Amicus was finally seized in June, 1993, it had nearly $5 billion in assets.

mutual financial consideration, to induce sound thrifts — at times — to become instantly insolvent, in the hope that the combination could survive and, given enough time, prosper. The delineation of the treatment of supervisory goodwill, and the inclusion of capital credits by the government, were essential components of these agreements. Without the ability to amortize supervisory goodwill over long periods of time, the combined thrift would often have been insolvent from its inception. Such mergers would not have been approved by the regulators.

A. The Government Faced A Potentially Catastrophic Thrift Crises In The 1980s.

The collapse of the thrift industry in the 1980s represented an economic crisis recalling the specter of past emergencies faced by the government in the Great Depression and World War II. Between 1934 and 1979, 143 thrifts failed at a total cost of $290 million.[2] By 1980, the thrift industry was insolvent on a net market value basis. By 1981, 85% of the nearly 3,800 thrifts insured by the FSLIC had negative earnings.[3] "The [Federal Savings and Loan Insurance Corporation (FSLIC)] could not afford to close all the S & Ls that were failing."[4] Between 1980

2. James Barth, *The Great Savings & Loan Debacle* 32 (AEI Press 1991).

3. Thomas Romer and Barry R. Weingast, *Congress: The Genesis of the Thrift Crisis*, 2 Stan. L.&P. Rev. 37 (1990). In April of 1981, Richard T. Pratt, chairman of the Federal Home Loan Bank Board (Bank Board) warned Congress that, "[t]he average savings & loan . . . is in the red, and is living off its net worth." Richard T. Pratt, *Competition And Condition In The Financial System*, Hearings before the Senate Committee on Banking, Housing and Urban Affairs, 97th Cong. 1st Sess. 96 (April 28, 1990).

4. William K. Black, *Ending Our Forebearers' Forbearances: FIRREA and Supervisory Goodwill*, 2 Stanford Law & Policy Review (Stan. L.&P. Rev.) 102 (1990).

and 1988, over 500 thrifts failed, costing the FSLIC an estimated $78 billion.[5] As of December 1989, 281 thrifts with $93 billion in assets were in conservatorships, and another 238 institutions with $189 billion in assets were "tangible insolvent."[6]

By the end of 1987, the FSLIC itself was insolvent by $14 billion. In the next year, the FSLIC was insolvent by over $50 billion.[7] As the Congress considered FIRREA in 1989, "liabilities facing the FSLIC and American taxpayers had reached $200 billion, and now stand at over $350 billion."[8]

In the face of such a rapidly expanding crisis, Congress empowered regulators with a variety of options for dealing with failed and failing institutions. A vital alternative was to encourage and enable healthy thrifts to merge with ailing ones, in the hope of creating a stronger institution capable of staving off the mounting economic plague.

B. The Government Authorized And Encouraged Thrift Mergers As A Less Expensive Means Of Resolving Troubled Thrifts.

Between 1980 and 1989, the FSLIC took primarily five different types of actions against insolvent institutions: (1)

5. Senate Report No. 19, 101st Cong., 1st Sess. 2 (1989) (hereinafter Senate Report).

6. James Barth and Dan Brumbaugh, Jr., *The Rough Road From FIRREA To Deposit Insurance Reform*, 2 Stan. L. & P. Rev. 61 (1990).

7. H.R. Rep. No. 54, 101st Cong., 1st Sess., pt. 1, (House Report), (1989) *reprinted in* U.S. Code Cong. & Admin. News 87,100.

8. Thomas Romer and Berry R. Weingast, *Congress: The Genesis of the Thrift Crisis*, 2 Stan. L. & P. Rev. 38 (1990).

liquidation; (2) assisted mergers; (3) stabilization; (4) the management consignment program (MCP); and (5) supervisory mergers. Liquidations and assisted mergers, generally referred to as resolutions, involved payments by the FSLIC to depositors or to the thrift's purchasers and were meant to finally resolve the problem. Supervisory mergers (which included the recognition of supervisory goodwill) were also meant to be final and were less costly to the government because they did not involve payments by the FSLIC. Stabilization and the MCP were temporary actions which were normally followed by liquidations or mergers.[9]

The FSLIC's options were all authorized by Congress. Most basic, the FSLIC was expressly authorized to make contracts. 12 U.S.C. § 1725(c)(3) (repealed 1989). Congress also charged the FSLIC with the discretion and power to effect mergers of financially distressed thrifts with healthy thrifts "in its sole discretion and upon such terms and conditions as [it] may prescribe. . . ." 12 U.S.C. § 1729(f)(1) (repealed 1989). The FSLIC was expressly authorized to assist thrifts either by issuing promissory notes, cash contributions, or guarantees against loss by reason of a merger. 12 U.S.C. § 1729(f)(2)(A) (repealed 1989). And, Congress recognized the regulators' practice of including supervisory of goodwill in capital. 12 U.S.C. § 1730h(d) (repealed 1989) (statutory changes in thrift accounting standards shall not "affect the authority [of the FSLIC] to authorize insured institutions to utilize . . . goodwill" in meeting regulatory requirements).

In the government's triage of failing thrifts, mergers played an important role because merging thrifts almost invariably cost the government less than liquidating them. By 1982, the FSLIC's

---

9. James Barth, *The Great Savings and Loan Debacle* 31 (AEI Press 1991).

average cost associated with assisted mergers was only 14% of the cost to liquidate a thrift. In contrast, the FSLIC's average cost to close an insolvent thrift between 1987 and 1990 ranged from 31% to over 40% of the institution's total assets. Supervisory mergers cost the government far less because they did not require direct financial contributions by the FSLIC. As was widely acknowledged,

> The use of goodwill under [Generally Accepted Accounting Principles] saved the federal thrift regulators a lot of money in transactions that involved the acquisition of a sick thrift by a healthy one. Any sensible healthy thrift considering the acquisition of a sick thrift . . . would look to the federal government to "fill the gap," that is, provide cash or government notes so that the asset of the sick thrift matched its liabilities. Because the government did not have sufficient resources, it filled the gap with goodwill. Such policy conserved the FSLIC's scarce cash resources, and provided the necessary incentive for healthy thrifts to acquire failing ones.

Michael S. Helfer and William Richardson, Jr., *Goodwill and Government Promises*, 2 Stan. L. & P. Rev. 118 (1990) (footnote omitted).

Consequently, in 1981, the Federal Home Loan Bank Board (Bank Board) began to publicize its decision to allow acquiring institutions to record goodwill as an intangible asset to attract buyers for the growing number of failing thrifts. *See, e.g.*, William K. Black, *Ending Our Forebearers' Forbearances: FIRREA and Supervisory Goodwill*, 2 Stan. L. & P. Rev. 102

(1990). The FSLIC's treatment of thrifts reflected its recognition of the benefits of mergers. Between 1980 and 1988, the FSLIC liquidated 78 thrifts, and assigned 95 thrifts to the MCP; during the same period, it also arranged 411 assisted mergers and 333 supervisory mergers. James Barth, *The Great Savings & Loan Debacle* 32-33 (AEI Press 1991). Mergers were clearly the FSLIC's preferred disposition for a problem that continued to worsen.[10]

Now, here, the government argues that, despite its repudiation of critical terms to the mergers, respondents "sought and obtained valuable government cash and non-cash financial assistance . . .," and the "benefits of the Bank Board policy permitting them to count goodwill as capital for the period during which that policy was in effect . . . ," and provided Glenfed "access to new and potentially lucrative markets in Florida. . . ." (Brief for the Petitioner (Petitioner's Brief) 14, 42-43). The argument is myopic. It looks past the obvious fact that respondents did not obtain the essential consideration of supervisory goodwill and capital credits for which they bargained, and which made the deals economically rational. In the case of Winstar and Statesman, the bargained-for goodwill ensured their solvency. In the face of similar arguments by the government, the Tenth Circuit observed:

> The Investors argue, and the district court agreed, that no rational investor would have acquired an insolvent institution and therefore the regulatory accounting treatment was fundamental to the agreement.

10. In congressional testimony in March 1989, the Bank Board identified 578 thrifts that were likely to require future action at an estimated cost of $38 billion. James Barth, *The Great Savings and Loan Debacle* 31 (AEI Press 1991); James Barth and R. Dan Brumbaugh, Jr., *The Rough Road From FIRREA to Deposit Insurance Reform*, 2 Stan. L. & P. Rev. 61 (1990).

> We agree. [¶] The benefit the Investors expected to receive when they agreed to acquire the failing Old Security was a solvent institution that passed regulatory muster. Without that threshold condition, there was no reason to invest capital and assume liabilities; potential profits would be financially meaningless and regulatory compliance impossible.

Resolution Trust Corp. v. Federal Sav. & Loan Ins. Corp (Resolution Trust), 25 F.3d 1493, 1502 (10th Cir. 1994).

Government-encouraged thrift mergers represented a conscious, financially beneficial strategy for dealing with the savings and loan crisis in the 1980s. While thrift mergers carried the potential for mutual financial benefit both to the government and to the thrifts, thrifts only benefitted upon the realization of the supervisory goodwill and other financial contributions which the government promised to make.

C. The Recognition Of Supervisory Goodwill In Thrift Mergers Was An Essential Component Of The Contractual Consideration From The Government.

The government contends that the agreements here did not contain explicit promises by the government defining how the thrifts could treat supervisory goodwill, so that the new thrifts would not become instantly insolvent upon completion of the merger. The Federal Circuit correctly concluded that an agreement as to the treatment of supervisory goodwill was essential consideration for each contractual transaction since the transactions would not have taken place (indeed, would not have made rational sense) without it.

Each of the three mergers involved extensive documentation and approval by the FSLIC and the Bank Board itself. Supervisory Action Agreements (Glendale Federal) or Assistance Agreements (Winstar and Statesman) included integration clauses to incorporate the contemporaneous resolutions and forbearance letters from the Bank Board and the FSLIC. *See* Pet. App. 15a-19a (Glendale); 20a-22a (Statesman); 22a-24a (Winstar).

The parties' treatment of supervisory goodwill was defined by the contemporaneous rules and regulations in effect. As such, the thrifts were contractually entitled to their legitimate expectations. The principle was explained by this Court in *United States Trust Co. of New York v. New Jersey (U.S. Trust)*, 431 U.S. 1 (1976):

> The obligations of a contract long have been regarded as including not only the express terms but also the contemporaneous state law pertaining to interpretation and enforcement. "This Court has said that 'the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms.' " *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 429-430 (1934) quoting *Von Hoffman v. City of Quincy*, 4 Wall, 535, 550 (1867). See also *Ogden v. Saunders*, 12 Wheat, at 259260, 297-298. (Opinions of Washington & Thompson, J.J.). This principle presumes that contracting parties adopt the terms of their bargain in reliance on the law in effect at the time the agreement is reached.

Id., 431 U.S. at 20, fn. 17. As acknowledged by the Federal Circuit below, in the case of Glendale:

> If the parties did not intend to use supervisory goodwill for regulatory capital purposes there would simply be no reason for the extensive negotiations and the conditions regarding its use. It is not disputed that if supervisory goodwill had not been available for purposes of meeting regulatory capital requirements, the merged thrift would have been subject to regulatory noncompliance and penalties from the moment of its creation.

Pet. App. 18a-19a. Given the central importance of supervisory goodwill, even if the government's obligations had been simply implied by the Bank Board Resolutions and the FSLIC forbearance letters, that should be held sufficient to bind the government in good faith now. In *United States v. Bostwick*, 94 U.S. 53, 66 (1876), this Court observed:

> The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them.

Having entered into such detailed integrated agreements which defined the manner in which the merged thrifts could account for supervisory goodwill, the government cannot now reasonably contend that such agreements were not properly authorized, negotiated and documented. The contracts did not

call for the surrender of sovereign power, but defined how goodwill was to be treated for those specific mergers.

II.

THE GOVERNMENT IS LIABLE FOR DAMAGES WHEN IT REPUDIATES FINANCIAL AGREEMENTS TO WHICH IT IS A PARTY.

The government miscasts its primary contention as respondents' attempt to restrict the sovereign's power to regulate the thrift industry for the common good. The surrender of sovereign power in a contract, the argument goes, requires that the sovereign do so in unmistakable terms. Correctly cast, however, the real issue is whether the government is liable for breaching its contracts, at its convenience, without paying for the consequences.

Beyond doubt, when the government acts to structure and accommodate the burdens and benefits of economic life, as in regulating an industry, it is not liable for incidental interference with the private economic expectations of states or individuals with which it deals. *Bowen v. Public Agencies Opposed to Social Security Entrapment* (*POSSE*), 477 U.S. 41 (1986); *United States v. Gaubert*, 449 U. S. 315 (1991) (regulators not liable in tort for allegedly negligently managing the operations of a thrift leading to its insolvency).

At the same time, it is beyond peradventure that when the government itself is a party to a financial agreement, it is bound by its word, as would be any private individual, and is liable for damages for breach of its word. *Lynch v. United States*, 292 U.S. 571 (1934); *Perry v. United States*, 294 U.S. 330 (1935); *U.S. Trust*, 431 U.S. 1 (1976).

In *Perry*, this Court discussed the limits of sovereign power when the government makes an agreement, there, in the form of government bonds:

> "Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors. No doubt, there was in March, 1933, great need of economy. In the administration of all government business economy had become urgent because of lessened revenues and the heavy obligations to be issued in the hope of relieving widespread distress. Congress was free to reduce gratuities deemed excessive. But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation."

Id., 294 U.S. at 352-353, quoting from the *Sinking Fund Cases*, 99 U.S. 700 (1878). Indeed, the principle that the government is bound by its financial agreements is as old as the government itself.

> [In a communication to the Senate of January 20, 1795, Mr. Hamilton states] "when a government enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as an individual. Its promises

> may be justly considered as excepted out of its power to legislate unless in aid of them. It is in theory impossible to reconcile the idea of a promise which obliges, with a power to make a law which can vary the effect of it."

Perry, 294 U.S. at 351, n. 3.

Throughout our history, Congress has sought to justify breaches of financial agreements by reference to "emergencies" of all sorts. In *Perry*, the emergency was the Great Depression. So, too, in *Lynch*, the government repealed War Risk Insurance policies through passage of the Economy Act which sought to reduce government gratuities.[11] Yet, despite the economic "emergency," and regardless of the fact that the insurance policies were not entered into in order to obtain a profit, this Court observed:

> But the policies, although not entered into for gain, are legal obligations of the same dignity as other contracts of the United States and possess the same legal incidence.

Lynch, 292 U.S. at 576. *See also, De La Rama Steamship Co. v. United States*, 344 U.S. 386 (1952) (plaintiff's claim under government issued War Risk Insurance for sinking of plaintiff's ship during World War II was still viable although government repealed War Risk Insurance in 1947).

---

11. The similarities between *Lynch* and the cases here deserve further note. "War Risk Insurance was devised in the hope that it would, in large measure, avoid the necessity of granting pensions." *Lynch*, 292 U.S. at 576, n. 2. This motive parallels the government's original justification for encouraging supervisory mergers, to avoid the greater cost of liquidating failed thrifts. In addition, War Risk Insurance — just as thrift regulations — was the subject of frequent amending legislation.

This Court's opinion in *U.S. Trust* is most instructive.[12] There, New York and New Jersey repealed their statutory pledge of a portion of the Port Authority of New York and New Jersey's revenues as security for repayment of Port Authority bonds. The States' justification for the repudiation was the economic emergency of rising costs from the national energy crisis. This Court held that the Contract Clause of the United States Constitution (Article I, section 10, clause 1) prevented the repudiation of the States' contractual promise given to the bond holders:

> Whatever the propriety of a State's binding itself to a future course of conduct in other contexts, the power to enter into effective financial contracts cannot be questioned. Any financial obligation could be regarded in theory as a relinquishment of the State's spending power, since money spent to repay debts is not available for other purposes. . . . Notwithstanding these effects, the Court has regularly held that the States are bound by their debt contracts.
>
> * * *
>
> If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.

U.S. Trust, 431 U.S. at 24, 26 (footnotes omitted).

---

12. Although *U.S. Trust* involved the actions of States, challenged under the Contract Clause, the same analysis applies to actions of the federal government under the Fifth Amendment. *U.S. Trust*, 431 U.S. at 26, n. 25; *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 278, n. 31.

This Court has been careful not to permit a government's invocation of "emergencies" to justify the abrogation of a government's financial agreements. *Compare U.S. Trust with Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934). Nor is the fact that the context of the government's financial obligations arises in a heavily regulated industry, alone, sufficient to justify the abrogation of intangible rights. *Compare Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (despite the extensive regulation of pesticides in the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. § 136 *et seq.*), Monsanto possessed property rights to trade secret information it was required to provide the government); *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974) (heavy regulation of the railroad industry did not preclude *Tucker Act* claims if railroads were not adequately compensated for government taking).[13]

The "unmistakability doctrine," upon which the government relies to contend that a sovereign's relinquishment of future legislative power must leave no room for doubt, was developed in the context of attempts to enjoin the sovereign's exercise of power. *Hughes Communications Galaxy, Inc. v. United States*, 998 F.2d 953, 958 (Fed. Cir. 1993); *POSSE*; *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).[14] Here,

13. This Court has never sanctioned the sentiments of William Seidman, then chairman of the FDIC: "I think most players in this game know that [the government breaking its contract is] a risk of the business. You can't rely on the government." *Seidman Suggests Nurturing Marginal Thrift Back to Health, United States League of Savings Institutions Washington Notes* 44(5): 4, 5 (February 2, 1990), quoted in Helfer & Richardson, "*Goodwill and Government Promises*," 2 Stan. L.&P. Rev. 117 (1990).

14. The Court's discussion of sovereign power in *Merrion* was in a unique context. The issue there was whether the Tribe inherently possessed the power to tax as a sovereign, not the "power" to renege on contracts where the (Cont'd)

merged thrifts do not contend that sovereign power has been contracted away; future regulations as to future mergers are not at issue. *Compare U.S. Trust*, 431 U.S. at 30, n. 28. The government may legislate, but it cannot unilaterally abrogate its own previously existing financial contractual obligations without liability for damages.

POSSE does not lead to a different result for the government. *POSSE* dealt with Congress' change in the Social Security Act which revoked the permission afforded states to withdraw from participation upon two years' notice. The Court held that Congress retained the right to change the program. As pertinent here, however, the Court also observed:

> But the "contractual right" at issue in this case bears little, if any, resemblance to rights held to constitute "property" within the meaning of the Fifth Amendment. . . . The provision [repealing withdrawal] constituted neither a debt of the United States, see *Perry v. United States, supra*, nor an obligation of the United States to provide benefits under a contract for which the obligee paid a monetary premium, see *Lynch v. United States, supra*. The termination clause . . . was [not] a term over which the State had any bargaining power or for which the State provided independent consideration.

POSSE, 477 U.S. at 55.

(Cont'd)
power to tax was never mentioned. *Id.*, at 138, 145 ("[P]etitioners and the dissent confuse the Tribe's role as commercial partner with its role as sovereign.").

Each of the factors identified in *POSSE* favors respondents here. Respondents negotiated and entered into contracts with the government, supported by mutual financial consideration. The Statesman merger required the government to pay $60 million. Pet. App. 9a. Respondents also provided independent consideration by infusing capital to purchase the ailing thrifts. Pet. App. 8a, 10a. And the government agreed to a definition of supervisory goodwill which permitted all three institutions to take up to forty years to amortize the goodwill. Pet. App. 8a, 9a, 10a. *POSSE* thus highlights the several factors which render the unmistakability doctrine inapplicable to the instant cases.

III.

THE SOVEREIGN ACTS DOCTRINE DOES NOT PRECLUDE RESPONDENTS' CLAIMS BECAUSE THE ABROGATION OF THE SPECIFIC CONTRACTS WAS EFFECTED BY THE ADOPTION AND IMPLEMENTATION OF PROVISIONS IN FIRREA INTENDED TO REPUDIATE THESE CONTRACTS.

The government is free to exercise its sovereign power to enact legislation for the general welfare. *Horowitz v. United States*, 267 U.S. 458, 461 (1925). However,

> The bounds of the immunity afforded the government by the sovereign acts doctrine . . . are not limitless. The limits of this immunity are defined by the extent to which the government's failure to perform is the result of legislation targeting a class of contracts to which it is a party. If Congress enacts legislation targeted to abrogate pre-existing contract obligations the government owes to private citizens, the government may be properly sued for breach.

Resolution Trust Corp. v. Federal Sav. & Loan Ins. Corp.(Resolution Trust), 25 F.3d 1493, 1501 (10th Cir. 1994) (allowing rescission).[15]

Here, the government may not invoke the sovereign acts doctrine to immunize its abrogation of respondents' contracts for two reasons. First, although on the whole FIRREA is fairly classified as public and general legislation, FIRREA also explicitly reached out and targeted thrift mergers by materially changing the provisions for supervisory goodwill. The same can be said of the comprehensive Economy Act of 1933, at issue in *Lynch*, where only thirteen words were the instigators of a breach. *Lynch*, 292 U.S. at 575. Second, the sovereign acts doctrine is inapplicable because the OTS exercised its Congressionally authorized discretion to implement FIRREA in a way which specifically abrogated supervisory goodwill contracts.

Both the Federal Circuit and the Court of Federal Claims acknowledged that the very purpose of the pertinent sections of FIRREA which eliminated the use of supervisory goodwill (12 U.S. C. §§ 1464(t)(3)(A) and (9)(B)) was to abrogate merged thrifts' rights to use supervisory goodwill as defined by their contracts. It is beyond the sovereign's power, even in enacting general legislation, to specifically abrogate private contractual

---

15. Courts have not been afraid to eschew the sovereign acts doctrine in a variety of circumstances. *See Sun Oil Co. v. United States*, 572 F.2d 786 (1978) (Secretary of Interior denied permit to install platform to oil company with lease to explore outer continental shelf); *Ottinger v. United States*, 88 F. Supp. 881 (Ct. Cl. 1950) (Manpower Commission, only source of labor in designated area, failed to supply workers to contractor engaged by the government to construct a levee); *Gerhardt F. Meyne Co. v. United States*, 76 F. Supp. 221 (1948), *cert. denied*, 334 U.S. 827; *Sunswick Corp., of Del. v. United States*, 75 F. Supp. 221 (1948), *cert. denied*, 334 U.S. 827.

rights, especially when the government is a party to the contract. *Perry*, 294 U.S. at 350-54; *Lynch*, 292 U.S. at 580-583; *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) (Minnesota's "pension funding charge," imposing requirement of retroactive contributions for small number of employers leaving state, held invalid); *Resolution Trust*, 25 F.3d at 1501-1502.

There is little doubt that Congress knew that its adoption of the specific provisions of FIRREA concerning supervisory goodwill would abrogate the government's existing agreements. As observed by the Chair of the Subcommittee on Financial Institutions Supervision, Regulations, and Insurance in debating FIRREA, "simply put, the Committee has reneged on the agreements that the government entered into concerning supervisory goodwill."[16]

Second, however, this Court need not reach the issue of FIRREA's impact, alone, upon respondents' contracts. The OTS was given discretion by Congress in dealing with supervisory goodwill which the OTS promptly exercised against respondents. The sovereign acts doctrine is inapplicable when an administrative agency with discretion specifically refuses to honor existing contracts with the government. The Tenth Circuit opted for this approach in *Resolution Trust:*

> However, if within such legislative mandate Congress provides the agency with discretion in enforcement because of Congress' awareness that prior agreements

16. H.R. Rep. No. 54(I) 101st Cong., 1st Sess. 298, *reprinted in* 1989 U.S. Code Cong. & Admin. News at 293 (statement of Reps. Annunzio, Kanjorski and Flake); *see generally*, David B. Toscano, Note, *Forbearance Agreements, Invalid Contracts For The Surrender of Sovereignty*, 92 Columbia Law Review 426, 436-438 (1992).

> would be abrogated by an abrupt change in the law, the agency would properly be held in breach of any agreements which could have been honored by the exercise of the discretion afforded them by Congress.

Resolution Trust, 25 F.3d at 1501; *see also, Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 280 n. 35 (1969).

FIRREA granted the OTS discretion to exempt thrifts for failing to meet the higher capital requirements under certain conditions. 12 U.S.C. § 1464(t)(7) (1989). In addition, the OTS was granted the authority to exempt an institution from the revised capital standards. 12 U.S.C. § 1464(t)(8) (1989). Nevertheless, the OTS not only did not exercise its discretion in favor of respondents, it even equated capital credits with supervisory goodwill, disallowing their use beyond the winnowed uses afforded to supervisory goodwill. 12 C.F.R. § 567.1(w). Hence, either FIRREA, itself, or OTS's implementation of FIRREA, expressly reneged on the essential promises in respondents' contract, rendering inapplicable the sovereign acts doctrine.

CONCLUSION

> And be these juggling fiends no more believed,
>
> That palter with us in a double sense;
>
> That keep the word of promise to our ear
>
> And break it to our hope.

Wm. Shakespeare, *Macbeth*, Act V, Scene. 8.

Amicus submits that the judgment of the Federal Circuit Court of Appeals should be *affirmed.*

Respectfully submitted,

DENNIS A. WINSTON
NELSON E. BRESTOFF
BRESTOFF & WINSTON
Attorneys for Amicus Western Federal Savings and Loan Association and WestFed Holdings, Inc.
1620 26th Street, Suite 2000N
Santa Monica, California 90404
(310) 582-8200

(15)

Supreme Court, U.S.
FILED
MAR 29 1996
CLERK

No. 95-865

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Petitioner,

v.

WINSTAR CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF OF FRANKLIN FINANCIAL GROUP, INC.; FRANKLIN FEDERAL SAVINGS BANK; FIRST AMERICAN CORPORATION; C. ROBERT SUESS, LEO C. SHERRY, JR., RICHARD A. GREEN, IRVING ROBERTS AND FOSTER, PAULSELL & BAKER, INC.; LANDMARK LAND COMPANY, INC.; 1ST HOME LIQUIDATING TRUST; FIRST BANK, F.S.B. AND FIRST BANK SYSTEM, INC.; CHARTER ONE BANK, F.S.B.; COMMERCIAL FEDERAL CORPORATION AND COMMERCIAL FEDERAL BANK, F.S.B.; CITIZENS FEDERAL BANK, F.S.B.; AND PERPETUAL FINANCIAL CORPORATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

THOMAS M. BUCHANAN
Counsel of Record
ERIC W. BLOOM
ROBERT A. BERGER
CHARLES B. KLEIN
WINSTON & STRAWN
1400 L Street, N.W.
Washington, D.C. 20005
(202) 371-5700
Attorneys for Amici Curiae

March 29, 1996

(Additional Counsel Listed on Inside Cover)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

30 pp

Of Counsel:

PAUL M. FISH
MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.
P.O. Box 2168
500 Fourth Street, N.W.
Sunwest Building, Suite 1000
Albuquerque, New Mexico 87103-2168

RONALD R. GLANCZ
JOHN F. COONEY
VENABLE, BAETJER, HOWARD & CIVILETTI, LLP
1201 New York Avenue, N.W., Suite 1000
Washington, D.C. 20005-3424

DON S. WILLNER
DON S. WILLNER & ASSOCIATES
Suite 303
111 S.W. Front Avenue
Portland, Oregon 97204-3500

JERROLD J. GANZFRIED
HOWREY & SIMON
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	2
SUMMARY OF THE ARGUMENT	4
ARGUMENT	4
I. THE GOVERNMENT OFFERED SUPERVISORY GOODWILL TO HEALTHY FINANCIAL INSTITUTIONS TO INDUCE THEM TO ACQUIRE TROUBLED THRIFTS SO THAT THE GOVERNMENT COULD AVOID COSTLY LIQUIDATIONS	4
A. The Federal Home Loan Bank Board, Confronting Its Own Insolvency, Searched For Stable Financial Institutions and Investor Groups	5
B. Charter Acquired Four Troubled Thrifts After Considerable Negotiations	9
C. Franklin Financial Acquired Morristown FS&LA After Considerable Negotiations	12
D. Benj. Franklin, Which Had Enjoyed 16 Consecutive Profitable Quarters, Was Seized Because The Institution No Longer Satisfied Its Regulatory Capital Requirements After Its Contracted-for Goodwill Was Taken Away	16
E. Landmark's Subsidiary Banks Were Seized Because The Government Abrogated Its Agreement To Calculate Capital In A Manner That Recognized The Fair Market Value Of Land Contributed By Landmark	17
F. All Other *Amici* Acquired Failing Thrifts Pursuant To Similar Contractual Terms	18

TABLE OF CONTENTS—Continued

	Page
II. THE GOVERNMENT DISTORTS THE FACTS TO AVOID ITS OBLIGATIONS UNDER THE GOODWILL AGREEMENTS	19
A. The Transactions In Question Were Binding Contracts	19
B. The Offer Of Supervisory Goodwill Furthered Important Governmental Interests	20
C. Congress Approved Regulators' Use Of Supervisory Goodwill In Contracts With Financial Institutions	21
D. A Governmental "Right" To Abrogate Contractual Commitments Is Inequitable And Would Wreak Havoc On Government Contracts	22
CONCLUSION	25

TABLE OF AUTHORITIES

CASES	Page
Charter Fed. Sav. Bank v. Office of Thrift Supervision, 976 F.2d 203 (4th Cir. 1992), *cert. denied*, 507 U.S. 1004 (1993)	6
Citizens & S. Corp. v. Commissioner, 91 T.C. 463 (1988), *aff'd*, 919 F.2d 1492 (11th Cir. 1990)	20, 21
Colorado Nat'l Bankshares, Inc. v. Commissioner, 60 T.C.M. (CCH) 771 (1990), *aff'd*, 984 F.2d 383 (10th Cir. 1993)	20, 21
KFOX, Inc. v. United States, 510 F.2d 1365 (Ct. Cl. 1975)	21
Laird v. United States, 556 F.2d 1224 (5th Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978)	21
Midlantic Nat'l Bank v. Commissioner, 46 T.C.M. (CCH) 1464 (1983)	21
Olympic Fed. Sav. & Loan Ass'n v. Office of Thrift Supervision, 732 F. Supp. 1183 (D.D.C. 1990)	7
Peoples Bancorporation v. Commissioner, 63 T.C.M. (CCH) 3028 (1992)	21
Winstar Corp. v. United States, 25 Cl. Ct. 541 (1992)	24
STATUTES	
12 U.S.C. § 1725(a) (repealed 1989)	22
12 U.S.C. § 1730h(d) (repealed 1989)	22
12 U.S.C. § 1730a(m)(1)(A)(ii) (repealed 1989)	22
Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989)	*passim*
MISCELLANEOUS	
1985 FHLBB ANN. REP.	6
1986 FHLBB ANN. REP	6
Financial Audit: Federal Savings and Loan Insurance Corporation's 1987 and 1986 Financial Statements, GEN. ACCT. OFF. REP. at 13 (July 1988)	6
Leslie Wayne, *Investors Decline Government Deals For Failed S&L's*, N.Y. TIMES, Nov. 14, 1990 at A1	24
Savings & Loan Policies in the Late 1970's & 1980's: Hearings Before the House Comm. on Banking, Fin. & Urban Affairs, 101st Cong., 2d Sess. 227 (1990)	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-865

UNITED STATES OF AMERICA,
Petitioner,

v.

WINSTAR CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF OF FRANKLIN FINANCIAL GROUP, INC.; FRANKLIN FEDERAL SAVINGS BANK; FIRST AMERICAN CORPORATION; C. ROBERT SUESS, LEO C. SHERRY, JR., RICHARD A. GREEN, IRVING ROBERTS AND FOSTER, PAULSELL & BAKER, INC.; LANDMARK LAND COMPANY, INC.; 1ST HOME LIQUIDATING TRUST; FIRST BANK, F.S.B. AND FIRST BANK SYSTEM, INC.; CHARTER ONE BANK, F.S.B.; COMMERCIAL FEDERAL CORPORATION AND COMMERCIAL FEDERAL BANK, F.S.B.; CITIZENS FEDERAL BANK, F.S.B.; AND PERPETUAL FINANCIAL CORPORATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Pursuant to Rule 37.3 of the Rules of this Court, *amici curiae* file this brief with the written consent of all parties. The written consent of the Petitioner, United States, and counsels of record for the Respondents, Winstar Corporation, United Federal Savings Bank, Statesman Savings

Holding Corporation, The Statesman Group, Inc., American Life and Casualty Insurance Company and Glendale Federal Bank, F.S.B. have been filed with the Clerk of this Court.

INTEREST OF *AMICI CURIAE*

1. First American Corporation, a Nashville-based bank holding company, acquired Charter Federal Savings Bank ("Charter") on November 30, 1995. Charter, a federal savings and loan association headquartered in Bristol, Virginia, operated in Southwest Virginia and Tennessee from 1920 through the First American acquisition in 1995.

2. Franklin Financial Group, Inc. ("Franklin Financial") is the holding company of Franklin Federal Savings Bank ("Franklin Federal") (previously Morristown Federal Savings & Loan Association), a savings and loan association operating in Morristown, Tennessee since 1935.

3. C. Robert Suess, Leo C. Sherry, Jr., Richard A. Green, Irving Roberts and Foster, Paulsell & Baker, Inc. participate herein on behalf of themselves and the other 6,000 shareholders of Benj. Franklin Federal Savings & Loan Association of Portland, Oregon ("Benj. Franklin"), a savings and loan association that was seized in 1990. The shareholders include many individuals whose life savings were invested as retirement funds in the shares of Benj. Franklin, including hundreds of former employees.

4. Landmark Land Company, Inc. ("Landmark") was initially incorporated in 1865 and became publicly traded in 1919 as an original member of the Curb Exchange (which became the American Stock Exchange).

5. 1st Home Liquidating Trust is the successor to 1st Home Federal Savings and Loan Association of the Carolinas, F.A., whose investors infused more than $30 million in a 1986 thrift recapitalization transaction.

6. First Bank, F.S.B., a federally-chartered stock savings bank, and its wholly-owning parent First Bank System, Inc., are successors by merger to Rocky Mountain Bank, F.S.B. of Cheyenne, Wyoming, a savings bank created in a 1988 thrift recapitalization transaction.

7. Charter One Bank, F.S.B., a wholly-owned subsidiary of Charter One Financial, Inc. and a federally chartered stock savings bank with headquarters in Cleveland, Ohio, acquired a failing thrift in 1982 in exchange for the government's contractual commitment regarding goodwill.

8. Commercial Federal Corporation and its subsidiary Commercial Federal Bank, F.S.B., a federally-chartered savings bank headquartered in Omaha, Nebraska, acquired, *inter alia*, failing thrifts in 1987 and 1988 transactions dependent upon government contract commitments regarding goodwill, preferred stock and a promissory note.

9. Citizens Federal Bank, F.S.B. ("Citizens Federal") is a federally-chartered stock savings and loan association headquartered in Dayton, Ohio. Citizens Federal acquired five failing thrifts during the 1980s in transactions dependent upon government contract commitments regarding goodwill and specific regulatory forbearances.

10. Perpetual Financial Corporation owns all of the stock of Perpetual Savings Bank ("PSB"), which acquired two troubled thrifts in consideration for government contract commitments regarding goodwill.

11. *Amici* have a significant interest in this case because they, like the respondents, have actions pending against the government in the United States Court of Federal Claims seeking, *inter alia*, a remedy for Congress' repudiation of certain government contractual obligations. In all of these cases, the government claims a right to abrogate with impunity bargained-for financial agreements to which it is a party and from which it has received valuable consideration.

SUMMARY OF THE ARGUMENT

1. The irony of this litigation is that the respondents, along with a number of other acquiring thrifts, holding companies and investor groups, have never been part of the savings and loan crisis. Rather, they have been and were recognized by the government to be part of the solution, the so-called "white knights" of the industry. Lacking the funds to save, or alternatively, to liquidate scores of troubled institutions, the government entered into a series of commercial transactions that squarely put the burden of recapitalizing troubled thrifts onto respondents and others similarly situated. However, rather than according these thrifts the contracted-for time in which to eliminate the deficits of the acquired thrifts, Congress repudiated these agreements and mandated instead that these institutions recognize immediately the deficits they inherited, a decision that rendered many institutions insolvent and subject to seizure.

2. The government interprets these contracts as allowing it to reap the substantial consideration provided to it and then to repudiate its obligations under the agreements with impunity, regardless of whether its repudiation leaves the contracting party debilitated, insolvent or even out of business. Nothing in law or equity permits such a perverse result.

ARGUMENT

I. THE GOVERNMENT OFFERED SUPERVISORY GOODWILL TO HEALTHY FINANCIAL INSTITUTIONS TO INDUCE THEM TO ACQUIRE TROUBLED THRIFTS SO THAT THE GOVERNMENT COULD AVOID COSTLY LIQUIDATIONS.

Upon reading the United States' brief, one is left with the inescapable impression that the concept of supervisory goodwill was a scheme developed by lobbyists for the savings and loan industry and foisted upon the United States. The government states in its brief that Members

of Congress, when considering the 1989 legislation that became the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183 (1989), reached the studied conclusion that supervisory goodwill was merely a "capital gimmick[]," a "shadowy" and "valueless" concept. Brief for Appellants at 4-5 (citations omitted). Such self-serving hyperbole by individual Members of Congress during the height of the political debate on the savings and loan crisis, however, cannot negate the essentially undisputed facts in this litigation: (1) that officials of the Federal Home Loan Bank Board ("FHLBB")—and not lobbyists for savings and loan associations—developed and implemented the concept of supervisory goodwill; (2) that regulators offered supervisory goodwill with the specific purpose of inducing otherwise reluctant investors and healthy institutions to acquire troubled thrifts that the government would otherwise have had to liquidate (but could not afford to liquidate); (3) that the government accepted the substantial benefits these deals accorded it—benefits which included cash, land and other tangible capital investors infused into the troubled thrifts; (4) that having reaped the benefits of the transactions, the government failed to honor its principal obligation under the agreements, *i.e.*, to accord the acquirors the right to treat the resulting goodwill as a regulatory capital asset; and (5) that as a result of the government's breach, many healthy and profitable thrifts were seized while others were significantly damaged.

A. The Federal Home Loan Bank Board, Confronting Its Own Insolvency, Searched For Stable Financial Institutions and Investor Groups.

By the early 1980s, when the federal regulators first introduced the concept of supervisory goodwill, the savings and loan industry was on the verge of collapse. From the late 1970s through the early 1980s, interest rates nationwide were at historic highs, forcing savings

and loan associations to compete for depositors by matching the prevailing rates. But the high interest rates, combined with the significantly lower rate of return savings and loans were receiving on long-term fixed rate mortgages, produced an interest rate mismatch and an avalanche of losses for the industry. In 1981-82 alone, the industry suffered more than $8.9 billion in operating losses. During one 12-month period during this time, more than 80 percent of all Federal Savings and Loan Insurance Corporation ("FSLIC") insured thrifts had incurred operating losses. 1985 FHLBB ANN. REP. 5-6.

During this same time period, the FSLIC, the agency charged by Congress since 1934 with providing deposit insurance for depositors of savings and loans nationwide, was depleting its reserves and facing bankruptcy, having expended billions of dollars to assist struggling thrifts while compensating insured depositors of failed thrifts. In 1980, the FSLIC maintained about $6.5 billion in reserves; by 1986, the agency ran a deficit of more than $6 billion, and the deficit was growing. 1986 FHLBB ANN. REP. 15, 25; *Financial Audit: Federal Savings and Loan Insurance Corporation's 1987 and 1986 Financial Statements*, GEN. ACCT. OFF. REP. at 13 (July 1988).

Without sufficient funds to liquidate failing thrifts and to pay the depositors, the FHLBB, together with the FSLIC, sought to develop and implement a policy of encouraging strong and healthy institutions to acquire ailing savings associations. Such a policy would render the acquiring institution responsible for eliminating the troubled thrifts' negative net worth for which the government would otherwise have been responsible. *See Charter Fed. Sav. Bank v. Office of Thrift Supervision*, 976 F.2d 203, 204-05 (4th Cir. 1992), *cert. denied*, 507 U.S. 1004 (1993).

The agencies initially offered cash incentives to purchasing institutions to encourage the acquisition of troubled thrifts and to minimize government pay-outs. *Id.*

While the cost of arranging these mergers was high, doing so preserved funds that otherwise would have been spent liquidating the failing thrifts. In fact, FSLIC-assisted mergers have "[h]istorically . . . cost about 70% of [the] cost of liquidation," thereby saving the government many millions of dollars. Remarks by H. Brent Beasley, Director of FSLIC, Before the California Savings and Loan League Management Conference (Sept. 9, 1982).

The FHLBB and FSLIC, however, soon recognized that the policy of providing cash contributions was only contributing to the depletion of the insurance fund. Because the agencies no longer could provide cash or other tangible financial incentives, the government began encouraging supervisory mergers and acquisitions by promising other, less costly, forms of assistance. *See Olympic Fed. Sav. & Loan Ass'n v. Office of Thrift Supervision*, 732 F. Supp. 1183, 1185 (D.D.C. 1990). The primary form of assistance was to allow an acquiring institution to treat the inherited deficit net worth as an intangible asset, called supervisory goodwill, to be amortized over an agreed-upon period of time. The offer of supervisory goodwill was vital to the government's efforts to encourage healthy thrifts to assume the liabilities of weaker institutions.

Richard T. Pratt, Chairman of the FHLBB from 1981 to 1983, in a statement before the United States House of Representatives, Committee on Banking, Finance and Urban Affairs, acknowledged the importance of supervisory goodwill:

> The Bank Board was caught between a rock and a hard place. While it did not have sufficient resources to close all insolvent institutions, at the same time, it had to consolidate the industry, move weaker institutions into stronger hands, and do everything possible to minimize losses during the transition period. *Goodwill was an indispensable tool in performing this task.* [Goodwill] provided a bridge which al-

> lowed the Bank Board to encourage the necessary consolidation of the industry, while at the same time husbanding the financial resources which were then available to it.

Savings & Loan Policies in the Late 1970's & 1980's: Hearings Before the House Comm. on Banking, Fin. & Urban Affairs, 101st Cong., 2d Sess. 227 (1990) (emphasis added). Thurman Connell, the former Senior Vice President of Supervision of the Atlanta Federal Home Loan Bank ("FHLB-Atlanta"), also testified that the offer of supervisory goodwill to acquiring institutions and investor groups was the linchpin of the government's efforts to rescue a struggling industry:

> [W]e were faced with an up hill [sic] battle of literally hundreds and possibly thousands of S&Ls running out of net worth. And [treating supervisory goodwill as an asset] was an alternative to being forced at that time to deal with all of those failures, because at that time the financial resources were not available to solve them in the way that the FSLIC had been able to solve cases in earlier years.
>
> * * * *
>
> [T]here was an effort made to find [a] means of being able to assist the industry in getting through this very difficult time, because as it stood, if interest rates did not change dramatically, *the possibility existed that the industry could entirely fail at that time*. . . . And one of the considerations that came up was the ability to use goodwill and to be able to incenticize [sic] healthy institutions that had a longer projected longevity to come in and take them over and to be able to stretch out, you know, the accounting for the goodwill.

Deposition of Thurman Connell (the relevant excerpts may be found in the Joint Appendix in the appeal of *Charter Fed. Sav. Bank v. OTS*, 976 F.2d 203 (4th Cir. 1992) at 243-44) ("*Charter* J.A."). Mr. Connell was unequivocal in his view that the regulators considered

the new treatment of supervisory goodwill as "a very important aspect of [the acquiring thrifts'] willingness to enter into these agreements." *Id.* at 224. The regulators, Mr. Connell concluded, "looked at [supervisory goodwill] as kind of the engine that made this transaction go. Because without it, there wouldn't have been any train pulling out of the station, so to speak." *Id.*

While the government now seeks to paint those thrifts and investment groups who contracted with the government as being part of the problem, and even a cause of the crisis, it was the government that turned to these groups to save the industry.

B. Charter Acquired Four Troubled Thrifts After Considerable Negotiations.

In June 1981, the government deemed Charter a viable and financially strong institution. The institution had a positive net worth and consistently satisfied every state and federal regulatory capital requirement in its history. In light of the institution's financial stability, the government from 1981 through 1985 repeatedly asked Charter to acquire troubled savings associations. In each instance, the government recognized that if it were unsuccessful in finding a merger partner, the troubled thrift would have to be liquidated at a cost to the FSLIC insurance fund of millions of dollars.

The government's first attempt to merge a troubled thrift with Charter came in mid-1981. Supervisory agents of the FHLB-Atlanta contacted Charter in an effort to persuade Charter to acquire First Federal Savings & Loan Association of New River Valley ("New River"). The market value of New River's liabilities exceeded the market value of its assets by approximately $13.5 million. Recognizing that it could not absorb New River's $13.5 million deficit net worth and remain in compliance with

the regulatory capital requirements, Charter declined the government's invitation to pursue the merger.

A few months later, supervisory agents again solicited the assistance of Charter. This time the FHLB-Atlanta asked Charter to acquire not only New River, but also Peoples Federal Savings and Loan Association ("Peoples"). The combined deficit net worth of these institutions exceeded $47.1 million.

Recognizing that Charter had once before turned down an opportunity to merge with a failing thrift, the government needed to provide Charter with an incentive to consummate the mergers. The government also knew that immediate recognition of the failing thrifts' combined deficit would leave Charter in noncompliance with the applicable capital requirements, thereby rendering the institution vulnerable to a government takeover. Lacking funds to offer Charter cash or other tangible assistance, the government opted to offer the institution *intangible* assistance. Specifically, the government agreed to permit Charter to use the "purchase method of accounting" provided for by Generally Accepted Accounting Principles ("GAAP") for purposes of determining the institution's compliance with regulatory capital requirements. Under the purchase method of accounting, the government agreed that Charter could treat the amount by which the market value of New River's and Peoples' liability exceeded the market value of their assets as supervisory goodwill, which could then be amortized over 40 years. This treatment of supervisory goodwill allowed Charter the right to forego recognizing immediately the inherited deficit net worth, instead according the institution time to eliminate the deficit through profits.

In 1985, the Cincinnati supervisory agents again approached Charter, this time in an effort to persuade Charter to acquire New Federal Savings and Loan ("New Federal"). The FSLIC created New Federal on November 16, 1984 by transferring the insured deposits from five failed savings and loan associations located in Tennessee to New Federal to provide depositors access to their deposits. From the time of New Federal's inception, a receiver appointed by FSLIC managed New Federal, whose liabilities exceeded the market value of its assets by approximately $15 million. Charter and the FSLIC eventually agreed to an acquisition similar to the 1982 transaction; that is, Charter was given the right to treat the resulting supervisory goodwill as a regulatory capital asset that could be amortized over a number of years.

Charter's final acquisition was consummated in June 1985, at which time Charter again answered the government's request for assistance and consented to acquire yet another insolvent thrift, Magnolia Federal Savings and Loan Association ("Magnolia"), which had been in receivership since June 7, 1985. As in each of the prior supervisory acquisitions, the ability to treat supervisory goodwill as an asset was an essential term of the agreement, without which Charter would not, and indeed could not, have consented to the acquisition.

In each of the above transactions, it was the government, and not Charter, that initiated the acquisitions. In each case, Charter fully satisfied its obligation of assuming the considerable deficit net worth of the respective institutions. Charter saved the federal government well in excess of $60 million that would otherwise have gone to cover insured depositors at these institutions. All Charter asked for, and was promised in return, was the right to treat the resulting supervisory goodwill as an asset for regulatory capital purposes to be amortized over a period of time.

Thurman Connell, who was the FHLB-Atlanta official approving Charter's mergers, testified that Charter's acquisitions gave rise to binding contractual obligations:

> Here we had an S&L that had agreed to take on a troubled thrift, but as really an incentive or prerequisite to their doing this, . . . they had to have the ability to recognize the goodwill over a period of time. . . . The Bank Board approved it and we had an agreement at that time. . . .
>
> * * * *
>
> [A]t that time it became something that you no longer could change; . . . it was an understanding, an agreement between the parties, and the Bank Board had accepted it and they were willing to be bound by the terms that they had agreed to.

Charter J.A. at 230.

Over the years, Charter proved its ability to increase its tangible net worth. While the acquisitions caused Charter's tangible net worth to decline by over $60 million, the institution was able largely to offset this amount by earning almost $50 million from 1982 through the passage of FIRREA in 1989. After staving off an attempt by regulators to appoint a conservator for the institution following the enactment of FIRREA, Charter raised the necessary capital to bring it into full capital compliance. Then, in 1995, First American acquired Charter.

C. Franklin Financial Acquired Morristown FS&LA After Considerable Negotiations.

In late 1988, the government was faced with the prospect of seizing a small, hometown thrift, Morristown Federal Savings & Loan Association ("Morristown FS&LA"), with offices in Morristown, Jefferson City and Newport, Tennessee. The thrift, which served the credit needs of local businesses and families in Morristown, Tennessee since 1935, suffered operating losses from 1983 through 1987 and amassed a negative net worth of $9.6 million. Had federal regulators appointed a receiver for Morristown FS&LA, the government would have had to spend

about $10 million to pay off the insured depositors, and such appointment would have simultaneously eliminated an important source of jobs and credit for the small community of which the thrift was a vital part.

Consistent with its policy of seeking private investor groups and other healthy institutions to acquire troubled institutions, the FHLBB turned to a group of local community leaders in the hope that they might agree to purchase Morristown FS&LA and permit the FSLIC to avoid another costly bailout. A group of seven Morristown citizens formed Franklin Financial. After months of negotiating with the FHLBB, Franklin Financial, on January 12, 1989, acquired Morristown FS&LA.

As part of its agreement with the government, Franklin Financial invested $5 million into the institution, which was renamed Franklin Federal Savings Bank. The parties agreed that this infusion would be more than sufficient to meet the capital needs of the institution. To obtain the $5 million, the Franklin Financial shareholders borrowed a significant amount of money from an unrelated commercial bank lender. The lender relied upon the credit of the shareholders and therefore did not require Franklin Federal to pledge its securities or assets. Rather, *the borrowing was secured by collateral belonging solely to the shareholders and their personal guarantees.* The shareholders intended that the debt would be serviced, in large part, by the dividends distributed by the institution. The shareholders also agreed that they personally would be responsible for any deficient payment of dividends based upon their respective pro rata interest in the holding company.

The parties memorialized their agreement in the Voting and Disposition Rights/Dividend Agreement ("Dividend Agreement"), signed and executed by the FSLIC and Franklin Financial. The Dividend Agreement provided that "[t]his Agreement, together with any understanding

agreed to in writing by the parties, supersedes all prior agreements and understandings of the parties in connection with the subject matter hereof." Article X.K. The parties further stipulated that "[t]his Agreement shall be deemed a contract made under and governed by Federal law." Article VIII.B.-C.

One of the writings drafted contemporaneously with and incorporated as part of the Dividend Agreement was a Forbearance Letter provided to Franklin Financial from the FHLBB. The Forbearance Letter stated:

> 1. For purposes of reporting to the Board, the value of any unidentifiable intangible assets resulting from accounting for the acquisition in accordance with the purchase method may be amortized by Franklin Federal Savings Bank over a period not to exceed 25 years by the straight line method.

The FHLBB thereafter waived all regulations and statutes that may conflict with the agreed-upon accounting treatment of the acquisition:

> This letter does not and shall not be construed to constitute forbearance or waiver by the Board or the FSLIC with respect to any regulatory or other requirements *other than those encompassed within the preceding paragraph 1*.

(Emphasis added.)

The Forbearance Letter, specifically negotiated, formed the heart of the deal. Both parties recognized that without the forbearance the undercapitalized institution would have been vulnerable to a government takeover the moment the deal was consummated. Thus, absent the forbearance, the shareholders of Franklin Financial would not have agreed to acquire the institution or to invest $5 million of their own money into the institution. Use of the purchase method of accounting, together with the

forbearance of conflicting statutory and regulatory requirements, however, permitted the new owners to invest their funds with the guarantee that they would be accorded the necessary time to eliminate the deficit that they inherited at the government's request.

Franklin Federal transformed its predecessor into a profitable institution. While Morristown FS&LA lost on average more than $200,000 annually from 1983 through 1988, Franklin Federal increased its tangible net worth every quarter since the transaction. The institution is now fully capitalized and satisfies every regulatory capital requirement.

Franklin Federal, however, almost was not afforded the chance to succeed. Eight months after Franklin Financial and the government executed the Dividend Agreement, Congress enacted FIRREA, and the regulators threatened Franklin Federal with seizure. Franklin Federal staved off seizure, first by obtaining an injunction prohibiting the government from seizing the institution (the injunction was lifted by the United States Court of Appeals for the Sixth Circuit), and subsequently by agreeing to invest approximately $5 million of additional capital into the institution, about $2 million directly from the seven shareholders and an additional $3 million through a public offering. While the additional capital brought Franklin Federal into capital compliance, the public offering drastically diluted the shareholders' ownership rights. Thus, as a result of the government's repudiation of its contract, the seven shareholders of Franklin Financial found themselves sinking significantly more money into the institution than was agreed, and at the same time receiving greatly scaled-back dividends, making it more difficult to recoup their investment. The net result: the government got what it bargained for but those who contracted with the government did not.

D. Benj. Franklin, Which Had Enjoyed 16 Consecutive Profitable Quarters, Was Seized Because The Institution No Longer Satisfied Its Regulatory Capital Requirements After Its Contracted-for Goodwill Was Taken Away.

While Franklin Federal and Charter have survived FIRREA, many other institutions have not been so fortunate. Benj. Franklin is one such institution.

In 1982, at the urging of federal regulators, Benj. Franklin acquired through merger a failing thrift, Equitable Savings and Loan ("Equitable"). Like the Franklin Federal and Charter deals, the government provided no financial consideration but instead agreed that the thrift could treat the inherited deficit as an intangible asset to be amortized over a period of time. The president of the Seattle Federal Home Loan Bank testified that he would not have approved the merger without the 40-year amortization of goodwill because without it "the merger would not have made any sense" since Benj. Franklin would have been rendered insolvent. The parties thereafter negotiated a 40-year amortization period.

In 1986, Benj. Franklin sought the government's approval to go public. The government initially conditioned its approval on Benj. Franklin reducing the 40-year amortization period to only 25 years. After significant negotiations, Benj. Franklin and the FHLBB reached a compromise whereby the amortization period was reduced to 32 years. That the government did not unilaterally impose an abbreviated amortization period on Benj. Franklin reflected the mutual understanding of the parties that the institution had a *contractual* right to treat supervisory goodwill as an asset to be amortized over the contracted-for and agreed-upon number of years. Benj. Franklin thereafter sold $50 million of stock to shareholders who relied upon the balance sheet, which included the goodwill amortization.

Benj. Franklin prospered. As the largest thrift in the Pacific Northwest, its net worth increased from $30 million at the time of the acquisition of Equitable in 1982 to $181 million at the time of the passage of FIRREA in August 1989. At that point in time, Benj. Franklin enjoyed a profit for 16 consecutive calendar quarters and fully complied with all capital regulatory requirements.

Notwithstanding that Benj. Franklin was highly profitable and would have earned its way out of the deficit it inherited, the institution was seized by the government in February, 1990, just six months after the enactment of FIRREA and two months after the implementing regulations became effective. The government, while depriving Benj. Franklin of the consideration for which it had bargained, nonetheless saved approximately $340 million that it would have had to pay to the depositors of Equitable had Benj. Franklin not acquired that institution. The net result: the government got what it bargained for, but those who contracted with the government did not.

E. Landmark's Subsidiary Banks Were Seized Because The Government Abrogated Its Agreement To Calculate Capital In A Manner That Recognized The Fair Market Value Of Land Contributed By Landmark.

Nor is the government's disregard of its contractual obligations limited to "goodwill contracts." Congress, in FIRREA, also prohibited recognition of the *actual value* of real estate contributed, despite contracts requiring such recognition. For example, Landmark, which was a real estate development firm whose stock was listed on the American Stock Exchange and that had no involvement with thrifts, acquired several thrifts from the government in and after 1982. In each instance, Landmark agreed to acquire and contribute real estate to troubled thrifts in consideration for the government's promise that the fair market value of the real estate contributed would

be counted as part of the respective institution's regulatory capital. Had Landmark not acquired these troubled thrifts, the FSLIC would have had to pay huge sums to the depositors of the thrifts.

Upon the passage of FIRREA, the government ordered Landmark to write down the book value of the contributed real estate, even though the real estate was without doubt worth substantially more. As a result of the forced write-down, the thrifts became "insolvent" on an accounting basis. It is undisputed that the real estate had value far greater than its book value.

The government then seized the thrift institutions acquired by Landmark. The Resolution Trust Corporation thereafter sold the real estate contributed by Landmark as part of the thrift acquisition and kept the proceeds. As the sole result of having trusted the Government to live up to its contracts, Landmark went from a highly successful company listed on the American Stock Exchange to an entity with no assets whatsoever. The public stockholders of Landmark found their stock worthless.

As a result of these deals, the government, upon seizing the Landmark subsidiaries, acquired the valuable and substantial real estate contributed by Landmark. Landmark, on the other hand, was left with nothing.

F. All Other *Amici* Acquired Failing Thrifts Pursuant To Similar Contractual Terms.

Likewise, all other *amici* herein (or their predecessors) took part in transactions involving, in substance, comparable fundamental terms. In each case, the government, to avoid substantial liabilities arising from its insurance obligations to the depositors of a failing thrift, offered essentially *financial* consideration or its equivalent to induce either a healthy preexisting thrift or outside investors to acquire or recapitalize the troubled thrift. Though there are variations in the particular forms of the parties' contracts, in substance the deals were the same.

II. THE GOVERNMENT DISTORTS THE FACTS TO AVOID ITS OBLIGATIONS UNDER THE GOODWILL AGREEMENTS.

A. The Transactions In Question Were Binding Contracts.

The government's brief is rife with references to standalone documents, FHLBB resolutions, regulatory approvals and forbearance letters, intimating that the FHLBB references to "amortization periods" and to the "purchase method of accounting" were *unilateral* decisions that did not give rise to or reflect contractual commitments. That issue, however, is not before this Court. While the government explicitly appealed to the Federal Circuit the finding of the Court of Federal Claims that the transactions gave rise to binding contracts, the government has chosen *not* to present that question to this Court. *See* Sup. Ct. R. 14.1(a). Given the government's decision *not* to challenge here that finding, the narrow question before this Court is whether the government can be held liable for breach of these contracts given congressional enactment of legislation allowing the government to accept the benefits of the contracts while precluding the agencies from providing, in return, the bargained-for consideration, *i.e.*, the right to treat supervisory goodwill as a regulatory capital asset to be amortized over an agreed-upon number of years.

Of course, to the extent the *existence* of these contracts is deemed an appropriate question on *certiorari*, this Court need only review the pleadings below to find that the government has not contested that the treatment of goodwill was specifically negotiated by the parties, and further, that in each instance the financial institution provided valuable consideration.

B. The Offer Of Supervisory Goodwill Furthered Important Government Interests.

While the government portrays supervisory goodwill as an accounting "gimmick," it was a device *developed by the government* that produced tangible results. As set forth above, the FSLIC lacked sufficient cash to liquidate failing thrifts and thus turned to healthy thrifts and investor groups to recapitalize failing institutions. Unable to provide tangible assistance to acquiring institutions, however, the FSLIC was unable to induce potential acquirors from going forward. Only by utilizing the purchase method of accounting and giving the acquiror a period of time to absorb the debt of the troubled institution was the government able to avoid the liquidation of hundreds of thrifts, thus saving the insurance fund billions of dollars. For example, Charter's and Franklin Federal's respective successes in turning around the institutions they acquired allowed the government to forego almost-certain liquidations that would have cost the FSLIC more than $70 million. Benj. Franklin's acquisition of Equitable alone saved the government some $340 million in what would have been an extraordinarily expensive liquidation.

While the government asserts in its brief that the idea (*its* idea) of goodwill was ill-advised, the concept of goodwill is hardly novel or suspect. One of the intangible assets recognized by the courts as comprising goodwill is the core deposit base of one financial institution acquired by another financial institution. *See generally Citizens & S. Corp. v. Commissioner*, 91 T.C. 463 (1988), *aff'd*, 919 F.2d 1492 (11th Cir. 1990); *Colorado Nat'l Bankshares, Inc. v. Commissioner*, 60 T.C.M. (CCH) 771 (1990), *aff'd*, 984 F.2d 383 (10th Cir. 1993). These and other cases recognize that:

> the value of the deposit base does not depend upon a vague hope that customers will patronize the bank for some unspecified length of time in the future. The value of the deposit base rests upon the ascertainable probability that inertia will cause depositors to leave their funds on deposit for predictable periods of time.

Colorado Nat'l Bankshares, 60 T.C.M. at 789 (citing Citizens & Southern, 91 T.C. at 499-500).

Financial institutions often buy the core deposits of failed banks separately from other assets. *Citizens & Southern*, 91 T.C. at 498; *Peoples Bancorporation v. Commissioner*, 63 T.C.M. (CCH) 3028, 3029 (1992) ("[d]eposits are sometimes purchased separately from any other assets; the FDIC has done this in resolving insolvencies of troubled banks"); *see also Midlantic Nat'l Bank v. Commissioner*, 46 T.C.M. (CCH) 1464, 1475 (1983) (right to solicit deposits of a failed bank held to be an amortizable and tangible asset). The Commissioner of Internal Revenue has admitted and stipulated that core deposits trade separately in the marketplace. Although the tax laws do not require separate sales to establish that an intangible asset has determinable value separate from goodwill, *Citizens & Southern*, 91 T.C. at 492-93 (discussing *Laird v. United States*, 556 F.2d 1224, 1233-34 (5th Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978); *KFOX, Inc. v. United States*, 510 F.2d 1365 (Ct. Cl. 1975)), there could be no clearer proof of the separate and unique value of core deposits than the fact that financial institutions frequently can and do buy core deposits independently of other assets.

C. Congress Approved Regulators' Use Of Supervisory Goodwill In Contracts With Financial Institutions.

Nor can the government legitimately suggest that Congress did not know of, approve or sanction the regulators' use of supervisory goodwill to induce healthy thrifts and investor groups to acquire troubled thrifts. Congress recognized the inability of the FSLIC to solve the problems on its own and gave the FSLIC a variety of tools to attract

new investors to insolvent thrifts.* In fact, Congress explicitly recognized the importance of the concept of supervisory goodwill in 1987 when it modified the National Housing Act to provide:

> No provision of this section shall affect the authority of the Corporation [(the FSLIC)] to authorize insured institutions to utilize subordinated debt and goodwill in meeting reserve and other regulatory requirements.

12 U.S.C. § 1730h(d) (repealed 1989). Congress thus not only sanctioned the practice of offering acquiring institutions the right to treat the assumed debt as supervisory goodwill, but also confirmed the FSLIC's authority to continue that practice.

D. A Governmental "Right" To Abrogate Contractual Commitments Is Inequitable And Would Wreak Havoc On Government Contracts.

In its attempt to avoid its obligations under the goodwill agreements, the government distorts the facts by mischaracterizing the acquiring thrifts and investment groups as opportunistic gamblers who sought a risky benefit from these goodwill agreements. Brief for Appellant at 2 ("thrifts frequently sought to increase the size of their loan portfolios, thus putting even more of their depositors' money at risk"). The government contends that the thrift industry, being highly regulated, "risk[ed] that this regu-

* The government makes much of the fact that the contracts of the *Winstar* plaintiffs were with the FSLIC rather than with the FHLBB. Of course, the FHLBB agreed to the contracts and entered into contracts implied-in-fact with plaintiffs when it passed its resolutions as part of the transactions. Congress authorized the FSLIC to enter into contracts and specifically granted the FSLIC the power to approve "Emergency Thrift Acquisitions" on "such terms as the Corporation shall provide." 12 U.S.C. § 1730a(m)(1)(A)(ii) (repealed 1989). The term "Corporation" meant the FSLIC. *Id.* § 1725(a).

latory policy [permitting the amortization of supervisory goodwill] might change in the future." *Id.* at 27.

Respondents do not contest the unremarkable proposition that regulated entities are always subject to some risk that the regulatory regime under which they operate may change. This case, however, is not about a right arising under a regulation. Rather, this case is about a *contractual* right, specifically negotiated and for which valuable consideration was provided. Under these circumstances, the thrifts cannot be said to have assumed the risk that their bargained-for rights may be eliminated, with impunity, by legislative or regulatory fiat. The government is simply wrong when it asserts that it may execute contracts devoid of any risk, secure in its knowledge that it may breach its contractual obligations with impunity should it, in its subjective opinion, find the contract inadvisable or its terms inconvenient.

If the government's argument were to be believed, then, for example, Congress could have enacted FIRREA *one day* after any of these transactions, seized the institution (if exclusion of the promised-for supervisory goodwill rendered the institution in noncompliance with the capital requirements) and taken the capital contributed by the acquiror, thus leaving the acquiror with nothing. According to the government, it simply makes no difference that the acquiror would not have received any of the promised benefits or that the government would have walked off with the acquiror's infusion of capital.

If the government were to enjoy the right to avoid its contract obligations with impunity, as it claims, the government would find it nearly impossible to raise private capital in the industry. Indeed, while everyone may agree that "private capital is the taxpayer's cushion . . . , ultimately reducing the bailout's cost to taxpayers," the regulators' unusual way of saying "thank you" to institutions

like *amici* only serves to scare off potential new investors and much needed private capital. *See* Leslie Wayne, *Investors Decline Government Deals For Failed S&L's*, N.Y. TIMES, Nov. 14, 1990 at A1. Investors, knowledgeable of the regulators' treatment of recapitalized thrifts, are wary of dealing with the government, recognizing that "the contract[s] you negotiate could be upset if the political winds change." *Id.* In fact, after the government began seizing the very institutions it induced to acquire the troubled thrifts the government could not afford to liquidate, private capital dried up because investors "do not trust the Government as a business partner." *Id.* All of this raises the simple question: if the government today can abrogate at will its contracts of yesterday, who tomorrow will be willing to assume the risk of dealing with the government in times of crisis?

Furthermore, if the government cannot be held to its word, it is merely a matter of time before those who contract with the government (in any industry) will conclude that the government is an unaccountable, unreliable business partner, thus causing the inevitable decline in competition for government contracts. Chief Judge Loren Smith in *Winstar Corp. v. United States*, 25 Cl. Ct. 541 (1992), acknowledging this eventuality, wrote:

> While the government may engage in extremely large and important contractual relationships, it would make all dealings with the government a very elaborate and expensive form of gambling to hold that the government may repudiate a contract whenever subsequent policy considerations dictate that it was not a good or prudent bargain.

Id. at 548. The increased risks in contracting with an entity that may abrogate its contracts tomorrow (or whenever the political winds change) without penalty inevitably would result in inflated government contract bids (which must be adjusted to account for this risk) and greater

government skepticism. That has never been the law, and this Court should decline to accept so radical a shift in the relationship between the government and private parties.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the other briefs filed in support of the Respondents, *amici* urge that the decision of the Federal Circuit *en banc* be affirmed.

Respectfully submitted,

THOMAS M. BUCHANAN
Counsel of Record
ERIC W. BLOOM
ROBERT A. BERGER
CHARLES B. KLEIN
WINSTON & STRAWN
1400 L Street, N.W.
Washington, D.C. 20005
(202) 371-5700
Attorneys for Amici Curiae

March 29, 1996

(20)

Supreme Court, U.S.
FILED
MAR 29 1996

No. 95-865

IN THE

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

WINSTAR CORPORATION, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the Federal Circuit

BRIEF *AMICUS CURIAE* OF KEYSTONE HOLDINGS, INC., AND AMERICAN SAVINGS BANK, F.A. IN SUPPORT OF RESPONDENTS

Filed by Consent of the Parties

MELVIN C. GARBOW
Counsel of Record
EDWARD H. SISSON
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000
Counsel for Amici Curiae

March 29, 1996

CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20006

36 pp

BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF AMICI'S INTEREST 1

SUMMARY OF ARGUMENT 4

ARGUMENT 8

I. FSLIC Was Created to Provide Surety Commitments to Thrift Depositors 8

II. The Cash Crisis at FSLIC 10

III. FSLIC Forbearances Were Net Worth Covenants Common in Contracts "Between Private Parties" 15

IV. The Capital Agreements Represented Significant Economic Substance 18

V. "Goodwill" and "Capital Credits" Were Only Accounting Terms FSLIC Chose to Express Its Commercial Agreements 21

VI. Required Capital Was the "Deductible" in FSLIC's Insurance Arrangements 25

VII. There is Nothing Particularly Sovereign or Governmental About Deposit Insurance 26

CONCLUSION 28

TABLE OF AUTHORITIES

CASES:

De La Rama S.S. Co., Inc. v. *United States*, 344 U.S. 386 (1953) 7,18,26,28

Perry v. *United States*, 294 U.S. 330 (1935) 20

STATUTES:

Financial Institutions Reform, Recovery, and Enforcement Act, Pub. L. No. 101-73, 103 Stat. 183 (1989) 3,7,20,26

Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, § 105, 92 Stat. 3641, 3647 (1978) 26

National Housing Act of 1934, Pub. L. No. 73-479, §§ 1, 2, 202, 48 Stat. 1246, 1248 (1934) 28

§ 402, 48 Stat. 1256 8-9,28

12 U.S.C. § 1725(c)(3) (1988) 9

12 U.S.C. § 1725(d) (1988) 9

12 U.S.C. § 1726(a) (1988) 9

12 U.S.C. § 1726(b) (1988) 9

12 U.S.C. § 1726(c) (1988) 9

12 U.S.C. § 1727(b) (1988) 9

12 U.S.C. § 1728(a) (1988) 9

31 U.S.C. § 9101 (1988) 27

I.R.C. § 382(1)(5)(F) (1988) 16

LEGISLATIVE MATERIALS:

H.R. Rep. No. 1922, 73 Cong., 2nd Sess. (1934) 9

Congressional Budget Office, *Reforming Federal Deposit Insurance* (1990) . . . . . *passim*

Congressional Budget Office, *The Economic Effects of the Savings & Loan Crisis* (1992) 9,23

Condition of the Federal Deposit Insurance Funds: Hearings Before the House Committee on Banking, Finance and Urban Affairs, 100th Cong., 2d Sess. (1988) 9,14

Departments of VA and HUD and Independent Agencies Appropriations for 1993: Hearings Before a Subcomm. of the House Comm. on Appropriations, 102nd Cong., 2d Sess. pt. 5 (1992) 8

Deposit Insurance Issues and Deposit Discipline: Hearing Before the Commerce, Consumer, and Monetary Affairs Subcomm. of the House Comm. on Government Operations, 101st Cong., 2d Sess. (1990) 15-16,27

Extinguishment of the FSLIC's Secondary Reserve Fund and Its Import Upon the Nation's FSLIC-Insured Institution: Hearings Before the Subcomm. on General Oversight and Investigations of the House Comm. on Banking, Finance and Urban Affairs, 100th Cong., 1st Sess. (1987) 10,11

Federal Deposit Insurance Corp. *et al.*, *Report to Congress on Federal Deposit Insurance*, 98th Cong., 1st Sess. (Joint Comm. Print 1983) 27

Federal Home Loan Bank Board 1988 Deals: Hearing Before the House Comm. on Banking, Finance and Urban Affairs, 101st Cong., 2d Sess. (1990) 12,14,15,16,23

Financial Condition of Federally Insured Depository Institutions: Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs, 100th Cong., 1st Sess. (1987) 13

Findings of Booz Allen & Hamilton Study of FHLBB: Hearing Before the Subcomm. on General Oversight & Investigations of the Senate Comm. on Banking, Finance and Urban Affairs, 100th Cong., 1st Sess. (1987) 10,11,12

General Accounting Office, *Financial Audit: FSLIC's 1986 and 1985 Financial Statements* 10,11

Oversight on the Condition of the Financial Services Industry: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs, 100th Cong., 2d Sess. (1988) 10,13,15,22

Roger C. Kormendi *et al.*, *The Origins and Resolution of the Thrift Crisis*, 2 J. Applied Corp. Fin. 85, (1989), *reprinted in FHLBB 1988 Deals: Hearing Before the House Comm. on Banking, Finance and Urban Affairs*, 101st Cong., 2d Sess. (1990) 3,15,21

ADMINISTRATIVE MATERIALS:

Federal Home Loan Bank Board Memorandum SP-37a to Principal Supervisory Agents, "Requests for Forbearances and Exceptions to Filing Requirements Regarding Supervisory Institutions" (March 7, 1986) 22

Federal Home Loan Bank Board, "Net Worth Requirements of Insured Institutions," 50 Fed. Reg. 6891 (1985) 17,22

Federal Home Loan Bank Board 1987 Annual Report 10,13,14

Federal Home Loan Bank Board 1988 Annual Report 11,14,21

Office of Thrift Supervision,
Thrift Bulletin 38-2 (Jan. 9, 1990) 3

Resolution Trust Corporation,
Report to the Oversight Board of the RTC and the Congress on the 1988/89 FSLIC Assistance Agreements (1990):

Vol. 1 13,16,18

Vol. 6 1,18,19

MISCELLANEOUS:

J. Phillip Adams *et al.*, *A Practical Guide to the Tax Considerations and Consequences of Acquiring Stock and Debt Securities of Financially Troubled Corporations, printed in 7 Tax Strategies for Corporate Acquisitions, Dispositions, Spin-Offs, Joint Ventures, Financings, Reorganizations and Restructurings* (PLI 1994) 6

American Institute of Certified Public Accountants, *Prepayments Into the Secondary Reserve of the FSLIC and Contingencies Related to Other Obligations of FSLIC*, Practice Bulletin 3 (1987) 12

Evelyn Gilbert, *Excess FDIC Deposit Insurance Coverage Is Now Available*, Nat'l Underwriter Prop. & Casualty-Risk & Ben. Mgmt. 27, March 22, 1993 27

Thomas S. Hemmendinger, *Hillman on Commercial Loan Documentation* (4th ed. 1994) 6

Restatement (Second) of Contracts § 71 (1981) 6

Sandra S. Stern, *Structuring Commercial Loan Agreements* (2d ed. 1990 & 1995 Cumm. Supp. No. 2) 5

Peter H. Weil, *Asset-Based Lending* (2d ed. 1992) 5

Williston on Contracts § 7:43 (4th ed. 1992) 6

STATEMENT OF AMICI'S INTEREST

The amici are an investor group consisting of Keystone Holdings, Inc. ("Keystone") and American Savings Bank, F.A. of Stockton, California ("New American"). In late 1988, pursuant to a comprehensive written contract with the Federal Savings and Loan Insurance Corporation ("FSLIC") and the Federal Home Loan Bank Board ("FHLBB"), Keystone and New American assumed more than $30 billion of liabilities owed to depositors and others and acquired certain of the assets of a failed predecessor thrift ("Old American") from FSLIC and FHLBB.

At the time of the transaction, Old American was the largest insolvent thrift and the second largest thrift of any kind in the country. It had barely survived one of the largest bank runs in U.S. financial history. Its liabilities, substantially all of which FSLIC insured, vastly exceeded its assets.

As part of the transaction, amici: (1) paid $350 million cash as FSLIC directed, and agreed to make further payments of up to $450 million; (2) gave FSLIC a warrant representing 30 percent of the sales value of the reorganized thrift; (3) assumed billions of dollars of FSLIC liabilities to depositors; (4) undertook to manage more billions of dollars of severely troubled real estate assets for the benefit of FSLIC; and (5) despite FSLIC's insolvency, extended $8 billion in credit to FSLIC in return for a ten-year note.[1]

In the transaction, amici neither acquired nor created any "goodwill" or any other intangible asset. But the terms and conditions of the $8 billion FSLIC note illuminate the real commercial substance of the capital agreements regarding "goodwill" and "capital credits" that the government challenges before this Court.

Amici accepted the $8 billion note from FSLIC with the clear written commitment from FSLIC and FHLBB that the note would bear interest at a rate 200 basis points in excess of

---

[1] *See* RTC, *Report to the Oversight Board of the RTC and the Congress on the 1988/89 FSLIC Assistance Agreements*, Vol. 6, Tab 1, at 6-16 (1990) (describing the American Savings transaction).

the average cost of funds (deposits, etc.) for thrifts in the Federal Home Loan Bank 11th District, as established periodically by the Federal Home Loan Bank of San Francisco.[2] The interest rate on the note approximated amici's interest obligations to depositors plus its overhead costs on the $8 billion in deposit liabilities which amici assumed and loaned to FSLIC.

Amici accepted this interest rate because FSLIC and FHLBB explicitly agreed in a "Note Forbearance" that, despite then prevailing requirements that thrifts post 3 percent capital to support insurance on deposits, New American would not have to post capital ($240 million) to sustain the $8 billion in deposits which the bank committed to the FSLIC note. The Note Forbearance allowed amici to avoid the cost of this capital (approximately equal to 100 basis points per annum on the $8 billion note). The Note Forbearance also allowed FSLIC to pay a lower interest rate on the note and yet offer a return on investment sufficient to attract amici to the risks of rehabilitating a bankrupt thrift. FSLIC's lowering of amici's required investment by the Note Forbearance lowered the required return.

After review, and as a condition to the closing of the transaction, the general counsel of the FHLBB rendered his written opinion to amici, in customary commercial form, that the transaction, explicitly including the Note Forbearance, "has been duly authorized by all requisite action of the Bank Board and the Corporation," that the agreements "constitute valid and binding obligations of, the Receiver and the Corporation," and that the agreements are "enforceable against the Receiver and the Corporation . . . in accordance with their respective terms."

---

[2] The basis point margin started at 225 basis points and decreased over time. *See* note 66 *infra*. The precise margin does not affect the arguments presented here. For simplicity, amici will refer to the rate as 200 basis points above the 11th District average cost of funds.

Thereafter, following the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act, Pub. L. No. 101-73, 103 Stat. 183 (codified at 12 U.S.C. § 1464, *et seq*. (1989)) ("FIRREA"), FSLIC's successor agency advised amici, as it advised the respondents, that it would retain amici's cash investment and the benefits from that investment, retain the valuable warrant amici had provided, retain the proceeds of amici's troubled-asset liquidations, retain amici's investment in the $8 billion FSLIC note, continue to limit its interest payment on the note to the 200 basis point margin, but immediately renounce the Note Forbearance and require amici to post capital for the note -- despite the agreement which had freed amici from that cost -- and pay nothing to compensate amici for the cost of that additional capital.[3]

The government's renunciation of the Note Forbearance agreement hurt amici badly. In practical terms, the renunciation of the Note Forbearance agreement and the imposition on amici of unreimbursed capital costs for the benefit of FSLIC's successor represented an enormous reduction in the net interest margin which FSLIC had agreed to pay on the $8 billion note. Viewed another way, the renunciation of the Note Forbearance and the requirement for additional capital was a unilateral increase in the FSLIC insurance deductible to be borne by amici and a retroactive repricing of the acquisition in favor of FSLIC.[4]

Amici wish to note these matters to illuminate the issues and to alert the Court that the particular forms of respondents'

---

[3] OTS, Thrift Bulletin 38-2 (Jan. 9, 1990).

[4] In regard to deposit insurance contracts, "[f]rom the thrift's viewpoint, . . . the deductible is the amount of equity capital at stake." Roger C. Kormendi *et al.*, *The Origins and Resolution of the Thrift Crisis*, 2 J. Applied Corp. Fin. 85, 95 (1989), *reprinted in FHLBB 1988 Deals: Hearing Before the House Comm. on Banking, Finance and Urban Affairs*, 101st Cong., 2d Sess. 144 (1990) (hereinafter Kormendi).

contracts do not encompass the full universe of contracts presented to the United States Court of Federal Claims.[5]

SUMMARY OF ARGUMENT

The government characterizes the transactions presented as promises restricting the exercise of "sovereign regulatory powers" and restraining the sovereign from "changing government policy."[6] The government goes on to argue what is essentially a political theory about the government's need at all times to be free to exercise sovereign authority without having "to pay in damages" to exercise that "privilege."[7] The argument is beside the point. This is not a case about limits on the government's sovereign "police power," or the government's entitlement to promote "public health and the public morals."[8] This is not a case, say, where a regulatory agency licensed the sale of a vaccine and then, after Congress barred the vaccine as unsafe, withdrew the license.

In marked contrast, this is a case in which an Insurance Corporation fully engaged in business but insolvent, owned by the government but without the cash to discharge its surety obligations, and seeking to save money for itself, made commercial covenants with respondents much like insurance contracts and bank contracts "between private parties." These contracts "do not implicate sovereign regulatory authority."[9]

---

[5] Amici are parties to a complaint filed on December 28, 1992 in the United States Court of Federal Claims, No. 92-872 C.

[6] Gov't Br. at 11.

[7] *Id.*

[8] *Id.* at 11, 37.

[9] Gov't Br. at 20 n.9 (acknowledging that "contract terms that resemble those in contracts between private parties, such as the price term in a lease of land, do not implicate sovereign regulatory authority" (citation omitted)).

Financial covenants regarding capital, net worth maintenance, and leverage, such as those presented to the Court, are commonplace in contracts between private parties, especially in contracts between insurance companies and banks:

> "The most critical of the covenants . . . is the maintenance of solvency, which is frequently stated as an affirmative requirement that the [contract party] maintain a net worth of not less than a stated amount . . . ."[10]

It is routine for private parties to agree on accounting rules departing from Generally Accepted Accounting Principles ("GAAP"), which govern capital and net worth calculations for purposes of financial covenants:

> "The document should also define how net worth is to be calculated. The starting point is generally accepted accounting principles. The main questions from the lender's standpoint are the inclusion or exclusion of *goodwill*, intangible assets, and contingent liabilities."[11]

It is also customary for private parties to express financial contract rights in the negative as "forbearances," which

---

[10] Peter H. Weil, *Asset-Based Lending*, ch. 7.2.2.4, "Financial Covenants," at 416-17 (2d ed. 1992) (hereinafter Weil). *See also*, Sandra S. Stern, *Structuring Commercial Loan Agreements*, ¶ 6.03[6] (2d ed. 1990 & 1995 Cumm. Supp. No. 2) (hereinafter Stern) (describing as a common capital covenant in private commercial agreements, promises by a party to maintain at all times: "a ratio of total liabilities to tangible net worth of not greater than ___ to ___" (the "leverage ratio" covenant)).

[11] Weil, *supra* note 10, at 417 (emphasis added). *See also* Stern, *supra* note 10, at ¶ 6.02[6]:

> "GAAP may treat or classify certain items in a way that is not intended by the borrower and the bank. In that case, certain terms must be defined in the loan agreement to ensure that the intended treatment is given to those items."

restrain a party from taking otherwise allowed enforcement actions so long as a covenantor maintains a stipulated level of capital or net worth. Without doubt, "[f]orbearance from exercising a right or doing an act one has a right to do is legal consideration."[12] Forbearance arrangements are especially common in work-out arrangements for the rehabilitation of insolvent companies, such as the thrifts which are the subject of these proceedings.[13]

In essence here, respondents agreed to assume the Insurance Corporation's liabilities to depositors and to risk millions of dollars of new investment in ways that improved the cash position of the Insurance Corporation and saved the Corporation money. In exchange the Corporation contracted to limit capital requirements, to accept an augmented insurance risk (reflected in lower capital requirements), and to insure a substantial quantity of deposits.

The Insurance Corporation made these contracts because they were far less costly to it than other commercial choices, a matter which the Corporation determined explicitly.

Respondents made the contracts because FSLIC offered them the opportunity to reduce their costs of capital, and risks of loss, and to leverage relatively small amounts of costly capital against substantial quantities of cheap (insured) deposits. Leverage had the desirable effect of reducing the aggregate cost of funds to the thrifts and enhancing the prospects that they could lend their funds conservatively but

---

[12] *Williston on Contracts* § 7:43 (4th ed. 1992). *See also* Restatement (Second) of Contracts § 71 (1981); Thomas S. Hemmendinger, *Hillman on Commercial Loan Documentation* 473 & 486 Form 24.1, "Forbearance Agreement" § 1 (PLI 4th ed. 1994) (whereby a lender or surety agrees to "forbear in the exercise of its rights and remedies . . . .").

[13] *See* J. Phillip Adams *et al.*, *A Practical Guide to the Tax Considerations and Consequences of Acquiring Stock and Debt Securities of Financially Troubled Corporations, in 7 Tax Strategies for Corporate Acquisitions, Dispositions, Spin-Offs, Joint Ventures, Financings, Reorganizations and Restructurings* 674 (PLI 1994).

at a profit commensurate with the risks they were accepting by assuming FSLIC's liabilities.

Thereafter, Congress criticized the Insurance Corporation for accepting the augmented insurance risk, substituted new agencies for the Corporation, and created a new commercial deposit insurance scheme, none of which is challenged here. But Congress also forbad the Corporation from performing certain of its contracts, and overrode certain of the Corporation's capital covenants by boosting capital requirements. These requirements reformulated the allocation of risk of loss between the federal insuring agency and the respondents, and breached the contracts. All in all, Congress, by its deliberate and targeted action, effectively repriced the transactions in favor of the Insurance Corporation, allowed the government to retain the immensely valuable consideration it had received from respondents, and inflicted serious damage upon respondents and others.

No one challenges the sovereign power of the Congress and the President to do what they did in FIRREA and to require the thrift industry to conduct itself according to new rules. Respondents seek only to recover damages caused them by some of those actions, in accordance with customary law applicable both to the government and to private parties which surrounds the making and breaking of financial covenants in commercial insurance contracts.

There is nothing especially governmental about the contracts presented here. As this Court has acknowledged, "the insurance business" is "a conventional commercial endeavor." [14] The government calling FSLIC's promise to leverage respondents' capital a commitment to "restrain regulatory policy" is like calling FSLIC's promise to pay interest on the note a commitment to "restrain financial policy." The use of the word "policy" disguises the commercial character of the matters presented and leads away

---

[14] *De La Rama S.S. Co., Inc.* v. *United States*, 344 U.S. 386, 389 (1953).

from a just result. The correct recognition of the contracts as the commercial bargains that they were -- with "terms that resemble those in contracts between private parties",[15] -- obviates the need to plumb the government's political theory, and requires only the recognition that when the government does business and makes business contracts it should obey customary rules of commercial justice.[16]

Certainly FSLIC could have conferred rights on respondents by procedures which would fairly qualify as "regulation." But that is not what happened here. FSLIC covenanted to net worth limits as a business corporation and conveyed leveraging rights through the process of bargain and sale. Respondents bought and paid for those limits and rights with dollars. FSLIC should not now be allowed to take back as "regulation" that which it has just sold for cash.

ARGUMENT

I. FSLIC WAS CREATED TO PROVIDE SURETY COMMITMENTS TO THRIFT DEPOSITORS

FSLIC was created in the wake of the bank collapse of the Depression as a wholly-owned government corporation to engage in the insurance business by insuring deposits mainly in federally chartered savings and loan associations. National

---

[15] Gov't Br. at 20 n.9.

[16] *See Departments of VA and HUD and Independent Agencies Appropriations for 1993: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 102nd Cong., 2d Sess. pt. 5, at 595-96 (1992) (FY 1993 Explanatory Information, FSLIC Resolution Fund) (explaining the cost-saving by the government "that is generated when the government is perceived as being committed to meeting its contractual obligations." If "the government is perceived as lacking the commitment" then "private industry will be increasingly reluctant to do business with the FDIC or RTC," and "disposing of failed financial institutions . . . will become increasingly difficult," the "incidence of liquidations . . . will rise," the "immediate need for cash with which to pay off insured depositors will increase," "losses will mount," and "the cost to the taxpayers goes up."

Housing Act of 1934, Pub. L. No. 73-479, § 402, 48 Stat. 1246, 1256 (codified as amended at 12 U.S.C. § 1725 (1988)) (repealed 1989). Congress, as the chartering agency, endowed the Insurance Corporation with customary business authority, including the "power . . . [t]o make contracts . . . upon such terms and conditions as the Federal Home Loan Bank Board may determine." *See* 12 U.S.C. § 1725(c)(3), (d).

The purpose of the Insurance Corporation was to provide thrifts with surety commitments which would protect depositors from loss of funds (deposits) loaned to depository institutions,[17] and assure a source of low-cost funds for use in encouraging home ownership.[18]

Throughout its corporate history, the Corporation operated much like a private insurance company and surety: it accepted applications for insurance from eligible institutions, made insurance agreements, 12 U.S.C. § 1726(b) (1988) (repealed 1989), issued certificates of insurance, *id.* § 1726(c), and collected premiums,[19] *id.* § 1727(b). FSLIC controlled insurance risk by supervising lending activities of insured institutions, *id.* § 1726(b), and by requiring that insured institutions co-insure by maintaining capital (shareholders' equity), so that the institutions risked the loss of all of their invested capital before exposing the Corporation to claims on its surety obligations to depositors.[20]

---

[17] 12 U.S.C. § 1726(a) (1988) (repealed 1989).

[18] *See* H.R. Rep. No. 1922, 73 Cong., 2nd Sess. 1-2 (1934).

[19] FSLIC insurance premiums were based solely on deposit volume, not the risk of default presented by any particular thrift. *See, e.g., CBO, Reforming Federal Deposit Insurance* 24 (1990); *Condition of the Federal Deposit Insurance Funds: Hearings Before the House Committee on Banking, Finance and Urban Affairs*, 100th Cong., 2d Sess. 188 (1988).

[20] 12 U.S.C. § 1728(a). *See generally* CBO, *Reforming Federal Deposit Insurance* 42-44; CBO, *The Economic Effects of the Savings & Loan Crisis* 3 (1992).

II. THE CASH CRISIS AT FSLIC

For more than forty years, the Insurance Corporation operated profitably, with premium income and interest earnings substantially in excess of its costs. By 1980, FSLIC had accumulated insurance reserves of some $6.5 billion.[21] But in the 1980's, a variety of problems produced a growing number of thrift insolvencies and failures.[22] Reimbursement of insured depositors at these institutions depleted the Corporation's resources. By the end of 1985, FSLIC's total reserves had slipped to $4.6 billion.[23]

In 1986, continuing large losses required FSLIC to write off the entire secondary reserve. Soon, the Insurance Corporation lost the primary reserve, too.[24] The Comptroller General, as head of the GAO, responsible for auditing FSLIC's financial statements,[25] reported to Congress that FSLIC's financial statements "reflect . . a deficit of more than $6 billion at the end of 1986."[26] FSLIC was clearly insolvent.[27]

---

[21] 1987 FHLBB Ann. Rep. 26.

[22] *See generally Oversight on the Condition of the Financial Services Industry: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 100th Cong., 2d Sess. 22-24 (1988) (hereinafter *Oversight Hearings*) (statement of GAO).

[23] *Extinguishment of the FSLIC's Secondary Reserve Fund and Its Import Upon the Nation's FSLIC-Insured Institutions: Hearings Before the Subcomm. on General Oversight and Investigations of the House Comm. on Banking, Finance and Urban Affairs*, 100th Cong., 1st Sess. 70 (1987) (hereinafter *Extinguishment Hearings*) (statement of GAO).

[24] *See* GAO, *Financial Audit: FSLIC's 1986 and 1985 Financial Statements* 23.

[25] 31 U.S.C. § 9105 (1988).

[26] GAO, *Financial Audit: FSLIC's 1986 and 1985 Financial Statements* 1.

[27] *See Findings of Booz Allen & Hamilton Study of FHLBB: Hearing Before the Subcomm. on General Oversight & Investigations of the Senate*

Further, the Comptroller "qualified" his audit opinion with respect to FSLIC's 1986 financial statements because of "uncertainty as to whether the Corporation can continue to fulfill its mission and meet its financial obligations."[28]

Shortly thereafter, Edwin Gray, Chairman of the FHLBB, testified that the insurance fund was down to "less than $1 billion in cash and investment securities," and was "being largely forced to shut down its case resolutions;" it was impossible to resolve many of the most costly FSLIC cases because resolution "would require more cash than we have."[29]

Early in 1987, FSLIC "supervisory cases" were losing $3.8 billion per year. Worse, as Chairman Gray testified, "that rate [was] growing dramatically."[30] So were FSLIC's losses. In June 1987, while its insurance obligations remained in the billions of dollars, FSLIC's cash and investments were down to $598 million.[31] By year-end 1987, some 505 savings and loan associations were insolvent and according to the GAO, FSLIC's reserves stood at a negative $13,690,220,000.[32]

FSLIC's grave problems began to feed upon themselves:

1. FSLIC's losses required thrift write-offs of shares of the secondary reserve, which rendered more thrifts insolvent.[33]

Comm. on Banking, Finance and Urban Affairs, 100th Cong., 1st Sess. 38 (1987) (hereinafter *Findings Hearing*) (statement of Edwin J. Gray, Chairman, FHLBB).

[28] GAO, *Financial Audit: FSLIC's 1986 and 1985 Financial Statements* 1.

[29] *Findings Hearing*, *supra* note 27, at 38.

[30] *Id.*; *see also* 1988 FHLBB Ann. Rep. 22.

[31] *Extinguishment Hearings*, *supra* note 23, at 72 (statement of GAO).

[32] *Id.* at 49.

[33] *See Extinguishment Hearings*, *supra* note 23, at 42, 47 (statement of the U.S. League of Savings Institutions).

2. FSLIC was illiquid from losses and from its inability to sell off thrift assets to recoup payments to depositors.[34] Thrift assets comprised mostly mortgage loans receivable, many delinquent, and real estate owned by the thrifts, mostly as a result of foreclosures. FSLIC could not dump these assets without breaking markets, sacrificing the value of the assets, undermining the value of collateral supporting still operating thrift institutions, thrusting more thrifts into insolvency, and imposing further burdens on itself.

3. In 1987, the American Institute of Certified Public Accountants, responding to FSLIC's severe insolvency, directed auditors for companies which accepted FSLIC notes to acknowledge the prospect of a FSLIC default with references in the financial statements and disclosures among "risk factors."[35] These accounting requirements made FSLIC notes less valuable and acceptable. Chairman Gray testified that FSLIC's "insolvency may cause accountants to require additional millions of dollars of write-downs by thrifts holding FSLIC notes," which would accelerate the collapse of additional thrifts.[36] At the same time, the GAO criticized FSLIC's assumption that investors would be willing to accept FSLIC notes rather than cash: "In view of FSLIC's precarious financial condition, we believe the degree to which FSLIC notes will be accepted as substitutes for cash remains

---

[34] *See FHLBB 1988 Deals: Hearing Before the House Comm. on Banking, Finance and Urban Affairs*, 101st Cong., 2d Sess. 186 (1990) (hereinafter *1988 Deals Hearing*) (statement of Lawrence J. White, Professor, New York University).

[35] AICPA, *Prepayments Into the Secondary Reserve of the FSLIC and Contingencies Related to Other Obligations of FSLIC*, Practice Bulletin 3, at 7 (1987) ("Although FSLIC at present continues to meet its financial obligations under those agreements, the uncertainties about its financial condition lead to a conclusion that a loss [on the notes] is at least reasonably possible.").

[36] *Findings Hearing*, *supra* note 27, at 38 (statement of Edwin J. Gray).

an open question."[37] Indeed, FSLIC's credit was so bad that the Federal Home Loan Banks refused to lend funds where thrifts offered a FSLIC instrument as collateral.[38]

4. FSLIC's lack of resources with which to resolve "but the smallest trickle" of the insolvent thrifts "due to its insolvency"[39] radically raised FSLIC's costs and losses.[40] Assets of insolvent but operating thrifts lost value at an accelerated pace.[41] Failing thrifts bid up interest rates on deposits, pushing competing thrifts into insolvency.[42] This required FSLIC both to resolve more thrifts and to issue notes at high interest rates to compensate acquirors for assuming high cost liabilities to depositors (i.e., high interest rate deposits).[43] It was imperative that FSLIC resolve failed thrifts quickly. But that required cash, and FSLIC had no cash.[44]

The next year brought no surcease. As the GAO reported, FSLIC started 1988 with responsibility for more than 200 "hopelessly insolvent institutions"[45] presenting an estimated

---

[37] *Oversight Hearings*, *supra* note 22, at 26 (statement GAO).

[38] *Financial Condition of Federally Insured Depository Institutions: Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 100th Cong., 1st Sess. 84 (1987) (hereinafter *Financial Hearing*) (statement of Edwin J. Gray).

[39] *Id.*

[40] 1987 FHLBB Ann. Rep. 27; *Oversight Hearings*, *supra* note 22, at 24, 27.

[41] *Financial Hearing*, *supra* note 38, at 84.

[42] See e.g., *Oversight Hearings*, *supra* note 22, at 27 (statement of GAO); *Findings Hearing*, *supra* note 27, at 38 (statement of Edwin J. Gray).

[43] RTC, *supra* note 1, Vol. 1, at 31.

[44] *Id.*; *see also* CBO, *Reforming Federal Deposit Insurance* at xiv (1990).

[45] 1987 FHLBB Ann. Rep. 27; *see also Oversight Hearings*, *supra* note

cost of $17.4 billion. And there were perhaps 300 additional institutions that would require resolution.[46] The Corporation estimated its 1988 costs at $33 billion.[47] But M. Danny Wall, then Chairman of the Bank Board, testified that "a precise estimate of the potential costs of resolving the problems of troubled FSLIC-insured institutions is not possible."[48] Wall noted that the Comptroller had criticized FSLIC's estimates as probably too optimistic. [49]

The Comptroller was right. Despite repeated efforts to recapitalize itself, in 1988 FSLIC reported a loss of $66 billion. On December 31, 1988 the Insurance Corporation had a net worth of *negative* $74,991,090,000.[50]

Finally, in 1989, Congress put the Corporation out of its misery. The Congressional Budget Office summed up these events as the "bankruptcy of FSLIC."[51] William Seidman, Chairman of both the FDIC and the RTC, testified about FSLIC's efforts: "[I]t was evident that the Bank Board was attempting to negotiate with no cash and doubtful credit."[52]

22, at 24 (statement of GAO).

[46] 1987 FHLBB Ann. Rep. 9, 27; *see also* 1988 FHLBB Ann. Rep. 21.

[47] 1988 FHLBB Ann. Rep. 21.

[48] *Condition of the Federal Deposit Insurance Funds: Hearings Before the House Comm. on Banking, Finance and Urban Affairs*, 100th Cong., 2d Sess. 185 (1988).

[49] 1988 FHLBB Ann. Rep. 21-22.

[50] *Id.* at 25, 49.

[51] CBO, *Reforming Federal Deposit Insurance* at xiv (1990).

[52] *1988 Deals Hearing*, *supra* note 34, at 20.

III. FSLIC FORBEARANCES WERE NET WORTH COVENANTS COMMON IN CONTRACTS "BETWEEN PRIVATE PARTIES"

Short of cash, FSLIC solicited investors who would acquire insolvent thrifts and obviate the need for the Corporation to make massive payments to depositors. These investors invested cash and other forms of new value. FSLIC determined each thrift disposition to investors to be less costly to FSLIC than liquidation, by more than $7.2 billion in total.[53] Plainly, FSLIC made the contracts that it did in order to save money.[54]

The thrifts FSLIC offered for acquisition shared two fundamental characteristics: they were book insolvent, (*i.e.*, the book value of their liabilities exceeded the book value of their assets) and the book value of their assets exceeded true value. FSLIC asked investors to assume liabilities to depositors vastly in excess of thrift assets. No rational business person would do that without more.

To encourage thrift acquisitions, FSLIC offered investors forms of "assistance" expressed in "assistance agreements." Assistance was overwhelmingly non-cash, and included commitments of deposit insurance which cut the cost and amount of required investor capital. FSLIC had no cash, but insurance was FSLIC's stock in trade.[55]

---

[53] *See 1988 Deals Hearing*, *supra* note 34, at 195 (statement of Lawrence J. White, Professor, New York University); Kormendi, *supra* note 4, at 93.

[54] For example, between 1985 and 1987, FSLIC's merger costs were 16 percent of the merged institutions' assets, while liquidation costs were 49 percent of the institutions' assets. *Oversight Hearings*, *supra* note 22, at 25.

[55] Alan Greenspan, Chairman of the Federal Reserve Board, testified to Congress that FSLIC assisted thrifts by accepting enhanced insurance risks. *Deposit Insurance Issues and Depositor Discipline: Hearing Before the Commerce, Consumer and Monetary Affairs Subcomm. of the House*

The main types of assistance comprised the following:[56]

1. *Negative net worth notes* represented the excess *book value* of liabilities assumed over assets acquired, and bore interest at contracted amounts.[57]

2. *Yield maintenance payments* indemnified acquirors for the difference between actual yield achieved on certain assets (*e.g.*, notes in default) and an agreed rate.[58]

3. *Capital loss coverage* indemnified acquirors for losses incurred upon sale of assets at less than book value or write-down of assets by the "mark-to-market" process.[59]

4. *Tax benefits sharing* authorized use of pre-acquisition thrift losses to shelter post-acquisition earnings.[60]

5. *Capital forbearances* were net worth covenants that reduced required tangible capital commitments to levels below those FSLIC then generally required. These forbearances cut the *cost* of capital for acquirors, reduced the overall investment returns FSLIC had to offer, and presented opportunities to leverage relatively small amounts of high-cost capital against large amounts of low-cost (insured) deposits,

---

Comm. on Government Operations, 101st Cong., 2d Sess. 17-19 (1990).

[56] *See generally* RTC, *supra* note 1, Vol. 1, at 46-47.

[57] *1988 Deals Hearing*, *supra* note 34, at 10 (statement of GAO).

[58] *Id.* For example, if the specified yield maintenance rate for an asset was 10 percent of book value per annum and the asset produced 4 percent (rents, interest, etc.), then FSLIC was contractually committed to pay the acquiror an additional 6 percent -- bringing the total yield to 10 percent.

[59] *Id.* The negative net worth notes were based on *book* values. Capital loss coverage was based on actual sales prices or fair *market* values.

[60] *See* I.R.C. § 382(1)(5)(F) (1988) (repealed in 1989 for acquisitions occurring on or after May 10, 1989). Generally, FSLIC required acquirors to pay over to FSLIC some portion of the taxes they saved as a result of the tax benefits. Thus, FSLIC used the acquirors to monetize unusable (by FSLIC) losses and to divert what otherwise would have been taxes paid to the IRS into a cash stream for FSLIC.

thereby reducing the aggregate cost of funds to the acquired thrifts and raising prospects for profitability.[61]

All forms of assistance are equivalent to *price* terms. All have a dollar equivalency. All were designed to offer profit opportunities to acquirors who would assume FSLIC's liabilities, invest cash, risk FSLIC's credit, save FSLIC huge sums of money, and protect FSLIC from *commercial* failure. All deserve equal commercial dignity as binding contracts.

The government acknowledges, as it must, that Congress and the President could not avoid contract obligations by legislation which reduced FSLIC yield maintenance, eliminated capital loss protection, cut interest rates on FSLIC notes, or changed other "terms that resemble those in contracts between private parties, such as the price term," without engendering liability to thrift contract parties.[62] But that is precisely what the government argues for here. The capital agreements were not licenses to sell dangerous drugs or to run high speed trains through grade crossings, which only a government could provide. As all the other forms of assistance, the forbearances were strictly commercial: net worth covenants made by an insurance company with a bank,

---

[61] *See* FHLBB, Net Worth Requirements of Insured Institutions, 50 Fed. Reg. 6891 (1985) (announcing amendment to capital requirements, noting that imposition of a 3 percent capital requirement has the effect of *"limiting ability to leverage new liabilities to a ratio of 33 to 1"* (emphasis added)). According to the FHLBB:

> "When an institution engages in an acquisition . . . in a supervisory context, [FSLIC] may act to reduce the impact which such a transaction could have under the net-worth regulation on the acquiring institution's minimum net-worth requirement. In this respect, the Board wishes to emphasize that it will continue its long-standing policy of encouraging the Corporation *to negotiate appropriately tailored forbearance agreements with institutions that are prepared to enter into supervisory acquisitions . . . at the Corporation's request.*"

Id. at 6898 (emphasis added).

[62] Gov't Br. at 20 n.9.

for which the acquirors paid FSLIC in full -- the kind of covenants which are commonplace in transactions "between private parties." It would "offend . . . standards of fairness" to deny remedies to respondents here in this "conventional commercial endeavor."[63]

IV. THE CAPITAL AGREEMENTS REPRESENTED SIGNIFICANT ECONOMIC SUBSTANCE

Amici's contract highlights the *commercial* character of respondents' transactions described *infra* at Part V.

Old American was the largest insolvent thrift in the country. It had more than $30 billion in liabilities and a huge net worth deficit. In late 1988, FSLIC put the thrift into receivership but lacked the cash needed to close the thrift and pay off the depositors or to pay required assistance to an acquiror. Amici were the only investors FSLIC believed were able to rehabilitate Old American.[64]

Pursuant to the acquisition contract, amici agreed to extend $8 billion of credit to FSLIC by assuming $8 billion of liabilities for which there were no offsetting assets in New American, and by accepting an $8 billion FSLIC note to fill the enormous hole in the New American balance sheet.[65]

FSLIC contracted to pay an interest rate on the note which was some 200 basis points over the average cost of funds to thrifts, reflected in an index prepared by the San Francisco Federal Home Loan Bank.[66] Amici's interest cost on the deposit liabilities it assumed was higher than this average cost because Old American, to stem near-fatal runs, had boosted

---

[63] *De La Rama S.S. Co., Inc.* v. *United States*, 344 U.S. 386, 389 (1953).

[64] *See* RTC, *supra* note 1, Vol. 6, Tab 1, at 1, 2-3, 4, 6.

[65] *Id.* at 11. The note was initially $7.8 billion and then adjusted after audit to approximately $8 billion.

[66] To be precise, the note bears an adjustable interest rate: initially 225 basis points over the index for a period, then 200 basis points for a period, and then 175 basis points until maturity in 1998. *Id.*, Vol. 1, at 105.

interest rates to retain deposits.[67] Thus, the interest rate FSLIC agreed to pay amici on the note roughly equalled New American's interest and overhead costs in servicing depositors on the $8 billion of liabilities which New American assumed and loaned to FSLIC.

Amici accepted this pass-through interest rate because FSLIC agreed that for the ten-year life of the note it would forebear from requiring amici to post capital to support the note.[68] This Note Forbearance Agreement relieved amici of the obligation to post some $240,000,000 of capital (3% x $8 billion).[69]

The Note Forbearance represented both a saving in cost and reduction in risk to amici. The industry disaster had driven up the cost of thrift capital. Sophisticated investors, cautioned by their accountants and eyeing FSLIC's impaired credit, sought annual returns of 25 to 40 percent on capital risked in efforts to revive bankrupt thrifts.[70] And no one had ever revived a thrift as large as Old American.[71]

If we accept an annual cost of capital of 35 percent (for the sake of argument), then, but for FSLIC's Note Forbearance, amici would have had to invest an additional $240,000,000 at an additional annual cost of $84 million (35% x $240 million = $84 million). That cost approximates one-half of the margin FSLIC agreed to pay on the $8 billion note (100 basis points (1%) x $8 billion = $80 million).

---

[67] *Id.*, Vol. 6, Tab 1, at 45.

[68] *Id.* at 21-22.

[69] The $240,000,000 is approximate. The precise amount does not affect the argument presented. The $240,000,000 would have been additional to the $350 million cash which amici invested in New American.

[70] The Court of Federal Claims has yet to determine the precise cost of capital. But the argument presented is meritorious at whatever the cost of capital ultimately determined, because it is a cost FSLIC would have had to bear but for its agreement to the Note Forbearance.

[71] RTC, *supra* note 1, Vol. 6, Tab 1, at 4.

Thus, but for the Note Forbearance, in order to reimburse amici's costs in assuming the $8 billion in deposit liabilities, *FSLIC* would have had to pay amici that additional $84 million per year in *cash*. This obligation would have been expressed by an interest rate in the note substantially *greater* than the stated 200 basis points margin. The 200 basis points margin was linked to the Note Forbearance.

Without doubt, FSLIC's agreement to forbear from requiring amici to post capital saved amici the cost of that capital. That was the point of the Note Forbearance. But important here is that FSLIC's agreement saved *FSLIC* the cost of providing a return to amici on that additional capital. Thus, FSLIC agreed to forbear from requiring $240,000,000 capital under then-applicable rules in order to save *itself* the cost of that capital. By reducing amici's required contribution of capital, FSLIC knowingly traded enhanced insurance risk-taking for cost-saving.[72] It was strictly commerce -- not "sovereignty" or "regulation."

Then, the government renounced the Note Forbearance and imposed the cost of additional capital on amici *solely for the benefit of FSLIC's successor*, with no increase in interest on the note to compensate amici for their additional cost.[73] The renunciation of the terms on which the interest margin was agreed for the sole benefit of the maker of the note is the precise equivalent of the government dropping the stated interest rate on the FSLIC note -- or changing the promised medium of repayment to greenbacks from gold. *See Perry* v. *United States*, 294 U.S. 330 (1935).

---

[72] The trade was responsible. Capital protects the deposit insurer against a thrift's losses from the investment of insured deposits in bad loans. But here amici invested the deposits in a loan *to FSLIC*. Moreover, if the Note Forbearance aided New American's profitability, FSLIC would participate through its 30 percent warrant in New American.

[73] Nothing in FIRREA required that renunciation because the Note Forbearance did not involve goodwill.

V. "GOODWILL" AND "CAPITAL CREDITS" WERE ONLY ACCOUNTING TERMS FSLIC CHOSE TO EXPRESS ITS COMMERCIAL AGREEMENTS

The transactions before the Court also demonstrate savings *by FSLIC* in the assistance payable to respondents as a result of FSLIC agreeing to accept diminished amounts of capital investment.[74] FSLIC agreed to reduce respondents' capital costs in lieu of paying respondents cash. The principles of commerce which prevail in contracts between private parties support recovery for the government's renunciation of those net worth covenants.

In the years under consideration, FSLIC generally required thrifts to maintain 3 percent capital. Among thrifts, capital is a proxy for deposits. Any particular level of capital, whether cash, "goodwill," or a "capital credit," translates under the terms of the insurance regime into a determinable level of allowed insured deposits. FSLIC and thrifts commonly referred to this relationship of capital and insured deposits as the "leverage ratio" or the "leverage limit." A 3 percent capital requirement or a 3 percent leverage limit thus authorized thrifts to hold $100 of FSLIC-insured deposits for every $3 of capital.[75]

Tangible capital was subject to all the entrepreneurial perils of the thrift business, and was very costly. But deposits were cheap. Because the government guaranteed the creditworthiness of thrifts, depositors did not fear a thrift's default, did not demand a default risk premium, and were willing to lend deposits to thrifts at low annual interest rates.[76] The low costs for deposits were important. Thrifts could not pay 35 percent returns for capital and profitably lend

---

[74] Capital (or net worth or owners' equity) is the difference between assets and liabilities. *See* 1988 FHLBB Ann. Rep. 24 n.1.

[75] *See, e.g., supra* note 61. Again, the precise level of required capital does not affect the argument presented.

[76] *See* Kormendi, *supra* note 4, at 87.

that money on home mortgages at 8 percent. They needed a large quantity of cheap deposits per dollar of expensive capital to lower the *aggregate* cost of funds and increase the profit margins on loans to their borrowers.

FSLIC knew this leverage between capital and deposits was vitally important to the thrift acquirors it solicited.[77] Reducing capital requirements per unit of deposits raises returns on equity.[78] That is why FSLIC featured the availability of agreements reducing the need for capital in its standard package of bid solicitation materials.[79] It was the common agreement among FSLIC and acquirors about the commercial value of leverage as between capital and deposits which underlay the use of the accounting terms "regulatory goodwill" and "capital credits" in FSLIC's resolution contracts.

To induce respondents to assume billions of dollars of liabilities for which FSLIC bore responsibility as insurer, FSLIC offered to increase the leverage limit by reducing capital requirements below the customary 3 percent. By this consideration, FSLIC offered what was, in practical terms, the opportunity to obtain $100 of insured deposits for an investment of costly capital of *less* than $3.

The increase in the leverage limit increased FSLIC's risk as an insurer.[80] That was the acknowledged consequence of

---

[77] The Bank Board acknowledged that FSLIC sought to "leverage private sector participation" in resolving the thrift crisis. *Oversight Hearing*, *supra* note 22, at 353 (statement of M. Danny Wall).

[78] *Cf.* CBO, *Reforming Federal Deposit Insurance* 59, 75 (1990) ("[A] trade-off exists between increasing capital requirements and maintaining the profitability and viability of depositories.").

[79] *See, e.g.*, FHLBB, Memorandum SP-37a to Principal Supervisory Agents, "Requests for Forbearances and Exceptions to Filing Requirements Regarding Supervisory Institutions" (March 7, 1986); 50 Fed. Reg. at 6898, *supra* note 61.

[80] *Cf.* CBO, *Reforming Federal Deposit Insurance* 58 (1990) ("Capital serves the deposit insurer . . .[b]y provid[ing] a buffer for the uncertainty

diminished capital in insured thrifts.[81] FSLIC offered leverage and accepted risk because it lacked cash. Thus, FSLIC contracted to provide deposit insurance, to reduce capital requirements, and to accept augmented insurance risk as a means of luring new investment into failed thrifts. This new investment took the form of fresh cash (*e.g.*, Winstar and Statesman) or the acquiring company's pre-existing net worth (*e.g.*, Glendale).

FSLIC and thrift acquirors could have expressed their bargains regarding leverage simply by saying that the thrifts could hold $100 of insured deposits for every *$2* of tangible capital, (*i.e.*, a 2% capital requirement). Or FSLIC could have said to thrift acquirors that it would insure deposits in an amount equal to fifty times the acquirors' tangible invested capital (*i.e.*, a 2% capital rule).[82]

Instead, FSLIC and the acquirors expressed their bargains as departures from FSLIC's otherwise prevailing limitation of $100 of insured deposits per $3 dollars of tangible capital.

To account for these leverage agreements, FSLIC and the acquirors used various *constructed* book entries such as "regulatory goodwill" and "capital credits." But these were only balance sheet notations. Their practical value lay in their

---

in determining the economic solvency of an institution.").

[81] The financial institution's own capital or equity is "the first line of defense" for the deposit insurance fund in case the financial institution's investments go bad. CBO, *The Economic Effects of the S&L Crisis* 3 (1992).

[82] In 1990, in testimony to Congress on the Federal Home Loan Bank Board 1988 Deals, the GAO noted that "[i]n return for about $2.2 billion of contributed capital, in the 94 assistance cases [investors] received $104.4 billion in assets; or about $46 in assets for every $1 invested." *Hearing Before the House Comm. on Banking, Finance and Urban Affairs*, 101st Cong., 2d Sess. 9 (1990). That ratio of capital to assets (1:46) is only slightly greater than 2 percent (2.107%).

utility to express FSLIC's agreement to augmented leverage in exchange for the new investment.[83]

The following simplified thrift balance sheets demonstrate these propositions:

THRIFT BALANCE SHEET A

Assets		Liabilities and Owners' Equity
Cash Borrowed from Insured Depositors	$100	$100 Owed to Insured Depositors
		$100 TOTAL LIABILITIES
Cash from Investors	$ 2	$ 2 Owners' Equity ("Tangible Capital")
TOTAL ASSETS	$102	$102 TOTAL LIABILITIES & EQUITY

Balance Sheet A reflects compliance with a 2 percent capital agreement.

Alternatively, the parties could have accounted for the same agreement by using a "regulatory goodwill" entry:

THRIFT BALANCE SHEET B

Assets		Liabilities and Owners' Equity
Cash Borrowed from Insured Depositors	$100	$100 Owed to Insured Depositors
		$100 TOTAL LIABILITIES
Cash from Investors	$ 2	$ 2 Owners' Equity ("Tangible Capital")
Regulatory Goodwill	$ 1	$ 1 Owners' Equity ("Intangible Capital")
		$ 3 TOTAL OWNERS' EQUITY
TOTAL ASSETS	$103	$103 TOTAL LIABILITIES & EQUITY

Balance Sheet B expresses the same *2* percent capital agreement with FSLIC as does Balance Sheet A. But it does so in special "regulatory accounting" terms which present the thrift's financial picture as compliance with a *3* percent capital

[83] From all that appears, "regulatory goodwill" and "capital credits" were terms FSLIC created merely to make the books of leveraged thrifts conform in appearance to all others and permit FSLIC to use its benchmarks for auditing thrifts without separate notation.

rule. In Balance Sheet B, "regulatory goodwill" is a constructed asset of no tangible value. The "regulatory goodwill" entry simply expresses the agreed leverage arrangements in accounting terms tailored by FSLIC to the thrift industry.

The situation is the same with "capital credits:"

THRIFT BALANCE SHEET C

Assets		Liabilities and Owners' Equity
Cash Borrowed from Insured Depositors	$100	$100 Owed to Insured Depositors
		$100 TOTAL LIABILITIES
Cash from Investors	$ 2	$ 2 Owners' Equity ("Tangible Capital")
Capital Credit	$ 1	$ 1 Owners' Equity ("Intangible Capital")
		$ 3 TOTAL OWNERS' EQUITY
TOTAL ASSETS	$103	$103 TOTAL LIABILITIES & EQUITY

Here again, the "capital credit" is merely a constructed term put on the balance sheet only to reflect in familiar accounting language the leverage arrangements explicitly agreed to by acquirors and FSLIC.

The form of accounting the parties chose to express their agreements should not reasonably affect the enforceability of the agreements. All of the examples reflect the same deliberate exchange of new value for insurance risk wherein FSLIC agreed to insure $100 of deposits for every $2 in tangible investment. This is not sovereignty, just commerce.

VI. REQUIRED CAPITAL WAS THE "DEDUCTIBLE" IN FSLIC'S INSURANCE ARRANGEMENTS

To reduce these matters even further to the realm of common experience, one can properly say that FSLIC agreed to insurance contracts covering $100 of deposits with the investors committing to a $2 co-insurance payment in the

nature of a *deductible*.[84] The deductible took the form of capital.[85] The investors co-insured the deposits by placing their $2 of tangible capital at risk in front of FSLIC's $100 of insurance obligation. FSLIC was required to pay nothing to depositors until the thrift paid out all of its assets including the investors' $2.

FSLIC was well within its statutory authority to accept the additional risk which accompanied this diminished coinsurance ($2 vs. the customary $3 deductible).[86] Congress in FIRREA objected to FSLIC's acceptance of that risk and now requires the FDIC as FSLIC's successor to write insurance contracts which require thrift owners to pay no less than a $3 deductible (or a $5 deductible, etc.). But the unilateral change in the deductible of previously negotiated contracts is a breach that entitles the respondents, who performed those contracts, to recover in damages.

VII. THERE IS NOTHING PARTICULARLY SOVEREIGN OR GOVERNMENTAL ABOUT DEPOSIT INSURANCE

The government bases all of its arguments on political theory about the inalienability of various police powers, and makes a considerable effort to ignore the commercial character of the Insurance Corporation and the contracts presented to the Court. But there is nothing particularly sovereign or governmental about deposit insurance. It is "a conventional commercial endeavor."[87] Private deposit insurance existed

---

[84] Co-insurance places a portion of the risk on the insured, thereby reducing the insurer's risk burden. It is usually achieved by a deductible. *See* CBO, *Reforming Federal Deposit Insurance* 44.

[85] *See supra* note 4.

[86] *See e.g.*, Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, § 105, 92 Stat. 3641, 3647 (1978) (amending Section 406(f) of the National Housing Act).

[87] *See De La Rama*, 344 U.S. at 389.

in this country before FSLIC was created.[88] Private deposit insurance continues to exist.[89] And many debate an expanded role in the economy for private deposit insurance.[90] It is therefore misleading for the government to speak of "sovereign regulatory authority" when all that is called for is conventional commercial justice.

True enough, the Insurance Corporation was wholly owned by the government. But that cannot transmute its insurance transactions from conventional commerce into "sovereign acts" of "regulatory policy." The TVA, the Saint Lawrence Seaway Development Corporation, the OPIC, the GNMA, the Export-Import Bank, the Uranium Enrichment Corporation, and other huge commercial enterprises, are also wholly owned by the government.[91] These corporations engage in business on a vast scale. That they are owned by the nation cannot

---

[88] New York banks established the first deposit insurance system in 1829 to guarantee bank notes and deposits. *See* CBO, *Reforming Federal Deposit Insurance* 7-8. *See also* FDIC *et al.*, *Report to Congress on Federal Deposit Insurance*, 98th Cong., 1st Sess. 139 (Joint Comm. Print 1983).

[89] *See, e.g.*, Evelyn Gilbert, *Excess FDIC Deposit Insurance Coverage Is Now Available*, Nat'l Underwriter Prop. & Casualty-Risk & Ben. Mgmt. 27, March 22, 1993; FDIC *et al.*, *supra* note 88, at 140 ("Private sector deposit insurance coverage is offered by some casualty and surety companies on a limited basis. This coverage generally takes the form of a surety bond, essentially providing clients with a guarantee that their deposit in a specific institution will be recovered at a specific time.").

[90] *See, e.g.*, FDIC *et al.*, *supra* note 88, at 30 ("To the extent that the private sector is capable of offering additional insurance coverage, this would add to the strength of market forces policing banking and the FDIC would of course welcome such a development."); *Deposit Insurance Issues and Deposit Discipline: Hearing Before the Commerce, Consumer, and Monetary Affairs Subcomm. of the House Comm. on Government Operations*, 101st Cong., 2d Sess. 25-26 (1990) (statement of Alan Greenspan) ("Another option [is] to rely more on . . . private deposit insurance as a replacement for FDIC insurance.").

[91] *See* 31 U.S.C. § 9101 (1988) (defining "wholly owned Government corporation" and listing FSLIC among the other government businesses).

reasonably mean that they are singularly disabled from making long-term commitments or that they are uniquely enabled to avoid long-term commitments with no obligation to the contract parties they injure. They must remain subject to customary rules of commerce and "standards of fairness . . . for private enterprise."[92] Any contrary rule would reduce these great businesses to barter transactions and so significantly raise their costs of doing business as to frustrate the public benefits their creation was intended to achieve.[93]

CONCLUSION

For the reasons stated, amici respectfully urge the Court to affirm the decision of the United States Court of Appeals for the Federal Circuit.

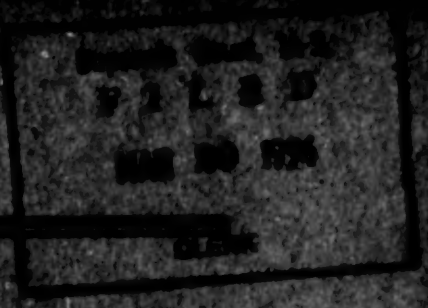
Respectfully submitted,

MELVIN C. GARBOW
Counsel of Record
EDWARD H. SISSON
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000
Counsel for Amici Curiae

---

[92] *See De La Rama*, 344 U.S. at 389.

[93] The same legislation which created FSLIC also created the Federal Housing Administration and FHA insurance of home mortgage loans. National Housing Act of 1934, Pub. L. No. 73-479, §§ 1, 2, 202, and 402, 48 Stat. 1246, 1248, 1256. There is, of course, private mortgage insurance to complement FHA insurance. Huge markets for pools of FHA-insured mortgages would be devastated if the government could freely and retroactively change the terms on which FHA insured these mortgages.



Supreme Court, U.S.
FILED
MAR 30 1996
CLERK

No. [illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Petitioner,

v.

WINSTAR CORPORATION, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

BRIEF *AMICUS CURIAE* OF THE LONG ISLAND SAVINGS BANK, FSB IN SUPPORT OF RESPONDENTS

RUSSELL E. BROOKS
Counsel of Record
FRED W. REINKE
MILBANK, TWEED, HADLEY
& McCLOY
1 Chase Manhattan Plaza
New York, N.Y. 10005
(212) 530-5890
Counsel for *Amicus Curiae*

[illegible]

37pp

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE LONG ISLAND SAVINGS BANK, FSB 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE RESPONDENTS HAVE VESTED CONTRACT RIGHTS RELATING TO THE RECOGNITION OF SUPERVISORY GOODWILL AND THE GOVERNMENT'S UNJUSTIFIED ABROGATION OF THOSE RIGHTS NECESSARILY GIVES RISE TO A VALID CLAIM FOR MONEY DAMAGES 5

A. The Government Granted Vested Contract Rights Concerning Goodwill in an Effort to Resolve a Financial Crisis and Avoid Government Obligations to Depositors of Failing Thrifts 5

1. The FSLIC's Strategy to Resolve the Thrift Crisis Included Encouraging Healthy Thrifts to Acquire Failing Thrifts 5

2. The FSLIC Acted Pursuant to Express Congressional Authority in Granting Respondents' Vested Contract Rights 8

B. The Respondents' Vested Contract Rights Concerning Goodwill Were Breached, for Which the Government Cannot Escape Liability 11

TABLE OF CONTENTS—Continued

	Page
II. THE SOVEREIGN ACTS DOCTRINE DOES NOT EXCUSE THE GOVERNMENT FROM LIABILITY BECAUSE FIRREA'S TERMS CONCERNING GOODWILL DO NOT UNAMBIGUOUSLY ABROGATE PRE-EXISTING VESTED CONTRACT RIGHTS AND THUS CANNOT BE GIVEN RETROACTIVE EFFECT	15
A. The "Clear Statement" Rule Concerning Retroactivity Is Applicable to the Construction of FIRREA	16
B. FIRREA Does Not Expressly Abrogate Vested Contract Rights Concerning Goodwill	21
CONCLUSION	30

TABLE OF AUTHORITIES

CASES

	Page
Baker v. Schofield, 243 U.S. 114 (1916)	13
Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988)	*passim*
Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986)	*passim*
Brimstone R. Co. v. United States, 276 U.S. 104 (1928)	17
Carteret Sav. Bank, FA v. OTS, 762 F. Supp. 1159 (D.N.J. 1991)	12, 27
Carteret Sav. Bank, FA v. OTS, 963 F.2d 567 (3d Cir. 1992)	12, 27
Charter Fed. Sav. Bank v. Director, OTS, 773 F. Supp. 809 (1991)	27
Charter Fed. Sav. Bank v. OTS, 976 F.2d 203 (4th Cir. 1992)	12, 26
Chew Heong v. United States, 112 U.S. 536 (1884)	21
Claridge Apartments Co. v. Commissioner, 323 U.S. 141 (1944)	17
De La Rama S.S. Co. v. United States, 344 U.S. 386 (1953)	23, 24
Estate of Samuel E. Bogley v. United States, 206 Cl. Ct. 695 (1975)	26
Far West Fed. Bank, SB v. Director, OTS, 738 F. Supp. 1559 (D. Or. 1990)	11, 26
Far West Fed. Bank, SB v. Director, OTS, 746 F. Supp. 1042 (D. Or. 1990)	12, 26
Far West Fed. Bank, SB v. Director, OTS, 951 F.2d 1093 (9th Cir. 1992)	11, 27
Flagship Fed. Sav. Bank v. Wall, 784 F. Supp. 742 (S.D. Cal. 1990)	12
Franklin Fed. Sav. Bank v. Director, OTS, 1990 U.S. Dist. LEXIS 20147 (E.D. Tenn. 1990)	12, 26
Franklin Fed. Sav. Bank v. Director, OTS, 927 F.2d 1332 (6th Cir.), *cert. denied*, 112 S. Ct. 370 (1991)	12, 26
Graver Tank & Mfg. Co. v. Linde Air Prod. Co., 336 U.S. 271 (1949)	13
Greene v. United States, 376 U.S. 149 (1964)	17

TABLE OF AUTHORITIES—Continued

	Page
Guaranty Fin. Servs., Inc. v. Director, OTS, 742 F. Supp. 1159 (M.D. Ga. 1990)	11, 26
Guaranty Fin. Servs., Inc. v. Ryan, 928 F.2d 994 (11th Cir. 1991)	11, 12, 27
Hansen Sav. Bank v. OTS, 758 F. Supp. 240 (D.N.J. 1991)	12, 26
Horowitz v. United States, 267 U.S. 458 (1925)	14, 15
Jones v. United States, 1 Cl. Ct. 383 (1965)	14
Landgraf v. USI Film Prod., 114 S. Ct. 1483 (1994)	*passim*
Lynch v. United States, 292 U.S. 571 (1934)	14
Miller v. United States, 294 U.S. 435 (1935)	17
Murray v. Gibson, 15 How. 421 (1854)	20
National Fuel Gas Supply Corp. v. FERC, 811 F.2d 1563 (D.C. Cir.), *cert. denied*, 484 U.S. 869 (1987)	18
NLRB v. Healthcare & Retirement Corp., 114 S. Ct. 1778 (1994)	28
O'Melveny & Myers v. FDIC, 114 S. Ct. 2048 (1994)	25
Perry v. United States, 294 U.S. 330 (1935)	14
RTC v. FSLIC, 25 F.3d 1493 (10th Cir. 1994)	30
Schwab v. Doyle, 258 U.S. 529 (1922)	20, 29
Security Fed. Sav. Bank of Florida v. Director, OTS, 747 F. Supp. 656 (N.D. Fla. 1990)	12, 26
Security Sav. and Loan Ass'n v. Director, OTS, 761 F. Supp. 1277 (S.D. Miss. 1991)	12, 26
Sinking-Fund Cases, 99 U.S. 700 (1878)	14
Statesman Sav. Holding Corp. v. United States, 26 Cl. Ct. 904 (1992)	11
Sterling Sav. Ass'n v. Ryan, 751 F. Supp. 871 (E.D. Wash. 1990)	12, 26
The Long Island Sav. Bank, FSB, et al. v. United States, 92-517C	2
The Twenty Per Cent Cases, 87 U.S. (20 Wall.) 179 (1883)	21
Transcapital Fin. Corp. v. Director, OTS, 44 F.3d 1023 (D.C. Cir. 1993)	27

TABLE OF AUTHORITIES—Continued

	Page
Transohio Sav. Bank v. Director, OTS, 967 F.2d 598 (D.C. Cir. 1992)	18, 27
United States Fidelity & Guar. Co. v. United States, 209 U.S. 306 (1908)	21
United States v. Heth, 3 Cranch 399 (1806)	20
United States v. Johnston, 268 U.S. 220 (1925)	13
United States v. Magnolia Petroleum Co., 276 U.S. 160 (1928)	17
United States v. O'Donnell, 303 U.S. 501 (1938)	13
United States v. Security Indus. Bank, 459 U.S. 70 (1982)	21
Winstar Corp. v. United States, 21 Cl. Ct. 112 (1990)	11
Winstar Corp. v. United States, 25 Cl. Ct. 541 (1992)	11, 26
Winstar Corp. v. United States, 64 F.3d 1531 (Fed. Cir. 1995) (en banc)	*passim*

STATUTES

1 U.S.C. § 109	23, 24, 25
12 U.S.C. § 1437	23, 25, 26
12 U.S.C. § 1464	*passim*
12 U.S.C. § 1725	24
12 U.S.C. § 1728(a) (repealed 1989)	5
12 U.S.C. § 1729	24
12 U.S.C. § 1821	24, 25
Act of May 28, 1935, Pub. L. No. 74-76, 49 Stat. 293	9
Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, 101 Stat. 552	10, 11
Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183	*passim*
Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, 92 Stat. 3641	9
Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469	9, 10
National Housing Act, Pub. L. No. 73-479, 48 Stat. 1246 (1934)	8

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS	Page
17 C.J.S. Contracts § 34	26
127 Cong. Rec. 25415 (1981) (Statement of Rep. Wylie)	6
Brief for the Petitioner (No. 95-865)	5, 15
Department of Justice Letter to Chairman of House Banking Committee dated June 12, 1989	28
FHLBB, Office of Examinations and Supervision, "Requests for Forbearances and Exceptions to Filing Requirements Regarding Supervisory Institutions," SP-37a, March 7, 1985	10
H.R. Rep. No. 101-54, 101st Cong., 1st Sess., pt. 1 (1989)	29
J. Kent, 1 Commentaries on American Law (1854)	21
Restatement (Second) of Contracts § 71(1) (1981)	26
R. Stern et al., Supreme Court Practice § 4.14	13
Testimony of M. Danny Wall, Director, Office of Thrift Supervision, *Investigation of Lincoln Savings & Loan Association: Hearing Before the House Comm. on Banking, Finance and Urban Affairs*, 101st Cong., 1st Sess., pt. 5 (1989)	6-7
Testimony of Richard T. Pratt, Chairman, Federal Home Loan Bank Board, *Savings and Loan Policies in the Late 1970's and 1980's: Hearings Before the House Comm. on Banking, Finance and Urban Affairs*, 101st Cong., 2d Sess. 227 (1990)	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-865

UNITED STATES OF AMERICA,
Petitioner,
v.
WINSTAR CORPORATION, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF *AMICUS CURIAE* OF THE LONG ISLAND SAVINGS BANK, FSB IN SUPPORT OF RESPONDENTS

INTEREST OF THE LONG ISLAND SAVINGS BANK, FSB

The Long Island Savings Bank, FSB ("LISB") is an operating thrift institution with a direct interest in the Court's resolution of the legal issues accepted for review. Consents to file this brief *amicus curiae* have been obtained from the Petitioner and the Respondents. This brief primarily addresses the propriety of the government's *retroactive* application of the goodwill provisions of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (codified in relevant part at 12 U.S.C. § 1464) ("FIRREA").

Like the Respondents, LISB acquired a failing thrift institution in a government-assisted transaction after being solicited by the government to make the acquisition. The government promised LISB significant assistance to make the acquisition possible. By acquiring the failing thrift, LISB saved the government at least $360 million—the amount the government would have had to spend to make the failing thrift's depositors whole.

Also like the Respondents, LISB entered into an acquisition contract, supported by consideration, with the government that granted LISB sted contract rights to apply, for accounting purposes, "supervisory goodwill" toward any future regulatory capital requirements. LISB would not have agreed to acquire the failing institution absent this agreed-upon accounting; indeed, not only would the failing institution acquired by LISB have remained insolvent without LISB's contract rights to treat supervisory goodwill as an asset, but LISB's officers would have been in gross dereliction of their duties to LISB's depositors for having entered into such a financially unfavorable acquisition.

This case has reached the Court because the government subsequently repudiated Respondents' vested contract rights to apply supervisory goodwill toward regulatory capital requirements. The government similarly has repudiated LISB's contract rights concerning supervisory goodwill. LISB was required, at a cost in the hundreds of millions of dollars, to make up the capital deficit created by the government's breach of its agreements to recognize supervisory goodwill for regulatory capital purposes. To recover these damages caused by the government's unjustified actions, LISB has filed suit in the United States Court of Federal Claims against the government. *The Long Island Sav. Bank, FSB, et al. v. United States*, 92-517C (Chief Judge Loren Smith). LISB's suit is stayed pending the outcome of this action. Because the pivotal

legal issues before this Court will directly affect the outcome of LISB's suit against the government, LISB has a great stake in this action. LISB also believes that its views concerning the government's liability for its actions may be of assistance to the Court's consideration of this case.

SUMMARY OF ARGUMENT

In the early 1980's, Congress was faced with the prospect of a severe collapse of the thrift industry and the reality that only limited financial resources were available to bail out failing thrifts. As a result, Congress enacted statutes delegating to thrift regulators broad authority to enter into contractual agreements whereby healthy thrifts, such as Respondents and LISB, would assume the often enormous liabilities of failing thrifts and even contribute additional capital to assist these thrifts. In exchange, healthy thrifts would receive, in lieu of direct financial assistance, significant non-cash benefits, including vested contract rights to apply supervisory goodwill toward thrift capital requirements.

These binding goodwill and other contractual rights were provided by thrift regulators to healthy thrifts pursuant to express statutory authority granted by Congress. These rights also constituted the very essence of the acquisition agreements. The acquisition of failing thrifts by healthy thrifts directly benefitted the government financially; had the failing thrifts actually failed, the government would have been required to spend hundreds of millions of dollars to make the depositors of the failing thrifts whole.

Subsequently, allegedly pursuant to the enactment of FIRREA, the government breached these acquisition agreements by preventing the acquiring thrifts from exercising their vested contractual rights to count goodwill toward their capital requirements. The government now asserts that it was free to breach these vested contract rights without any liability for money damages. However,

as this Court has made clear on numerous occasions, when the government enters into purely commercial business transactions in its capacity as a private contractor, it is just as liable for contract damages as is a private party who breaches a binding contract. Accordingly, the government is not permitted to escape liability for money damages as a result of its breach of these contracts, including Respondents' goodwill accounting agreements.

The government has asserted that the sovereign acts doctrine excuses it from any liability, including payment of money damages, for breach of the Respondents' goodwill accounting contract rights. This doctrine, which excuses the government from liability when a "public and general" sovereign act extinguishes existing contract rights as an incidental and unrelated effect of that act, is not applicable in the case before the Court.

The sovereign act that the government claims protects it from liability for breach of the Respondents' goodwill accounting contract rights is Congress's enactment of FIRREA. The government claims that FIRREA operates retroactively to abrogate Respondents' vested contract rights concerning goodwill and to extinguish Respondents' rights to money damages. However, the Court has long applied a "clear statement" rule that no Congressional statute will be given retroactive effect to abrogate prior vested contract rights or bar the recovery of money damages unless Congress clearly and unambiguously indicates such intent primarily, if not solely, *in the actual text of the statute*. The statutory text of FIRREA discloses no such clear and unambiguous Congressional intent, as numerous federal district and circuit courts have found.

Thus, FIRREA does not support the government's assertion of the sovereign acts doctrine. Instead, thrift regulators acted without statutory authorization in specifically breaching the Respondents' acquisition agreements, and the government is fully liable for all contract damages caused by its breach of these agreements.

ARGUMENT

I. THE RESPONDENTS HAVE VESTED CONTRACT RIGHTS RELATING TO THE RECOGNITION OF SUPERVISORY GOODWILL AND THE GOVERNMENT'S UNJUSTIFIED ABROGATION OF THOSE RIGHTS NECESSARILY GIVES RISE TO A VALID CLAIM FOR MONEY DAMAGES.

A. The Government Granted Vested Contract Rights Concerning Goodwill in an Effort to Resolve a Financial Crisis and Avoid Government Obligations to Depositors of Failing Thrifts.

The government's brief in this case sets forth in detail the nature of the financial ills that faced the thrift industry in the early 1980's. Brief for the Petitioner at 2 (No. 95-865) ("Pet. Br."). During that time period, the Federal Savings and Loan Insurance Corporation (the "FSLIC") was statutorily obligated to insure the deposit accounts of most thrifts up to a maximum of $100,000 per account upon payment of premiums and other costs. 12 U.S.C. § 1728 (a) (repealed 1989). Whenever a thrift failed, the FSLIC was required to reimburse depositors for any lost funds deposited in that thrift, up to $100,000.

The number of insolvent FSLIC-insured thrifts more than tripled in 1981 (from 16 to 53) and more than quadrupled again in 1982 (to 219). The magnitude of insolvencies among federally-insured thrifts made it impossible for the FSLIC simply to close down the failed thrifts and pay off their depositors. It was clear by 1981 that Congress and the responsible federal agencies faced a severe financial crisis in the thrift industry.

1. *The FSLIC's Strategy to Resolve the Thrift Crisis Included Encouraging Healthy Thrifts to Acquire Failing Thrifts.*

In 1981, to stem the rising costs associated with liquidating failing thrifts, costs that threatened to exceed the FSLIC's available reserves, the FSLIC adopted a new

strategy—it encouraged healthy thrifts, such as Respondents and LISB, to acquire failing thrifts, thereby avoiding large assistance payments by the FSLIC. To implement this strategy, the FSLIC obtained expanded statutory authority from Congress that permitted the FSLIC to arrange mergers and acquisitions of failing thrifts before they failed. Congress expanded the FSLIC's authority based on its belief that such arrangements constituted "a cheaper alternative to liquidation" and would thus "save money for the insurance funds." 127 Cong. Rec. 25415 (1981) (Statement of Rep. Wylie).

To attract buyers for failing thrifts, the FSLIC also began to publicize its view that a buying thrift would be permitted to rely on the "purchase method of accounting," including the recording of goodwill as an intangible asset in accordance with Generally Accepted Accounting Principles ("GAAP"). In particular, the FSLIC would contractually agree to recognize goodwill as capital for regulatory purposes in a merger or acquisition as a substitute for cash that it did not have available.

> The Bank Board was caught between a rock and a hard place. While it did not have sufficient resources to close all insolvent institutions, at the same time, it had to consolidate the industry, move weaker institutions into stronger hands, and do everything possible to minimize losses during the transition period. Goodwill was an indispensable tool in performing this task. . . . It facilitated mergers without incurring the inordinant [sic] cash costs associated with liquidating institutions during the most unfavorable cyclical peak in American economic history.

Testimony of Richard T. Pratt, Chairman, Federal Home Loan Bank Board, *Savings and Loan Policies in the Late 1970's and 1980's: Hearings Before the House Comm. on Banking, Finance and Urban Affairs*, 101st Cong., 2d Sess. 227 (1990). *See also* Testimony of M. Danny Wall, Director, Office of Thrift Supervision, *Investigation of Lincoln Savings & Loan Association: Hearing Before the*

House Comm. on Banking, Finance and Urban Affairs, 101st Cong., 1st Sess., pt. 5, at 447 (1989) (those healthy thrifts which acquired failing thrifts were permitted to book goodwill "in lieu of [direct] federal financial assistance."). The result of the FSLIC's strategy was a host of individually-negotiated commercial transactions between the FSLIC and private entities like LISB, which could be induced to make otherwise extremely unattractive investments only if such investments were accompanied by strong, binding government commitments.[1]

For example, the FSLIC employed this general strategy in connection with LISB's acquisition in 1983 of a failing thrift, Suffolk County Federal Savings and Loan Association ("Suffolk"). In soliciting bids for Suffolk in December 1982, the government advised potential bidders that the FSLIC only could provide limited financial assistance for the acquisition, notwithstanding that the FSLIC estimated its potential liability should Suffolk fail to be $472.6 million. At that time, Suffolk's liabilities exceeded the market value of its assets by some $625 million.

Obviously, no responsible LISB official could agree to assume such massive liability without a countervailing benefit to render the acquisition a reasonable business transaction. LISB therefore conditioned any acquisition of Suffolk on an agreement by the government that, con-

---

[1] Granting goodwill rights supported by consideration to acquiring thrifts was just one of many regulatory devices that the FSLIC used extensively—pursuant to its broad statutory authority—to induce prospective acquirors to proceed with acquisitions of insolvent and otherwise unattractive institutions. In the context of assisted acquisitions of troubled thrifts, regulatory recognition of supervisory goodwill as capital constituted bargained-for commitments governing the future regulatory treatment of the assets, liabilities or capital levels of institutions which were taking over the business of failed institutions. Whether these devices related to legal or financial requirements, they were designed to allow acquirors a specified period of time to overcome financial problems inherited from the failed institution.

sistent with GAAP, the LISB subsidiary that acquired Suffolk could count goodwill as an asset "for any and all regulatory purposes," to be amortized over a 40-year period. Following negotiations with the government, the parties executed an Assistance Agreement that created a vested contract right, supported by consideration, in favor of LISB and its acquiring subsidiary concerning the recognition of goodwill. The government believed it was getting a good deal—it concluded that its cost in connection with this agreement was $75 million, as opposed to a potential immediate cost of $472.6 million if Suffolk failed, and that LISB's bid presented the lowest cost and least risk to the FSLIC of any offer submitted.[2]

2. *The FSLIC Acted Pursuant to Express Congressional Authority in Granting Respondents' Vested Contract Rights.*

In negotiating these transactions, the FSLIC utilized the broad statutory authority granted to it by Congress to guarantee acquirors against loss. From its establishment in 1934 until the effective date of FIRREA in 1989, the FSLIC had authority under the National Housing Act, Pub. L. No. 73-479, 48 Stat. 1246 (1934) ("National Housing Act"), to act as receiver or conservator of insolvent thrifts and to pay off their deposit obligations to the limits of the FSLIC's insurance coverage. *See* National Housing Act § 406, 48 Stat. 1246, 1260. In 1935, the FSLIC's powers were expanded to permit it to act to prevent the insolvency of a troubled thrift by making

[2] The problems to which regulatory forbearances related could also have been resolved by the payment of additional monies by the government, for example to raise capital to standard levels. Such regulatory forbearances were, from the government's point of view, however, attractive "non-cash" acquisition terms that avoided expenditures that otherwise would have been necessary to induce acquisitions of troubled thrifts. Had the FSLIC not used forbearances, it would have had to use cash to induce prospective acquirors to commit to the transaction.

loans to, purchasing the assets of, or making contributions to the troubled institution. *See* Act of May 28, 1935, Pub. L. No. 74-76, 49 Stat. 293, 299.

In 1978, the FSLIC's assistance authority was expanded still further to authorize the FSLIC to "facilitate" the merger or acquisition of a failing thrift, and to that end the FSLIC was empowered to "guarantee" the new owner "against loss by reason of its merging or consolidating with or assuming the liabilities and purchasing the assets of such insured institution in or in danger of default" (hereinafter referred to as "the FSLIC's guarantee-against-loss powers"). *See* Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, 92 Stat. 3641, 3647. Congress authorized the FSLIC to provide such guarantees "upon such terms and conditions as the Corporation [FSLIC] may determine," provided, with certain exceptions, that the cost of providing the guarantee against loss did not exceed the cost of liquidating the troubled institution.

On October 15, 1982, in response to the thrift crisis of the early 1980's, Congress enacted the Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 ("Garn-St Germain"). Garn-St Germain strengthened still further the FSLIC's guarantee-against-loss powers to "facilitate" mergers and acquisitions of troubled thrifts. The FSLIC was empowered to provide assistance to facilitate the merger or acquisition of an insured thrift when "severe financial conditions exist which threaten the stability of a significant number of insured institutions or of insured institutions possessing significant resources" and assistance would "lessen the risk to the Corporation [FSLIC]." *See* Garn-St Germain § 122, 96 Stat. 1469, 1480-81. Congress also reaffirmed in Garn-St Germain the FSLIC's authority "to enter into and enforce covenants and agreements that it determines to be necessary to protect its financial interests." *Id.* at 1481.

In Garn-St Germain, Congress also granted statutory authority (preempting any state restrictions) for "emergency thrift acquisitions" of an interstate or cross-industry nature (*i.e.*, acquisitions of thrifts by bank holding companies or banks). *See* Garn-St Germain § 123, 96 Stat. 1469, 1483. The FSLIC was empowered to bring about such emergency thrift acquisitions "on such terms as the Corporation [FSLIC] shall provide" whenever certain severe financial conditions existed and such an acquisition "would lessen the risk to the Corporation [FSLIC]." *Id.* To consumate emergency thrift acquisitions, the FSLIC was authorized expressly to "solicit such offers or proposals as are practicable from any prospective purchasers" deemed "qualified and capable," was required to "give consideration to the need to minimize the cost of financial assistance," and was authorized to effectuate such acquisitions "on such terms as [FSLIC] shall provide." *Id.* at 1483-84.

The FSLIC's use, pursuant to broad statutory authority, of regulatory devices relating to goodwill and other credits became so prevalent that the Federal Home Loan Bank Board (the "FHLBB") issued a policy statement in 1986 to guide the negotiators. FHLBB, Office of Examinations and Supervision, "Requests for Forbearances and Exceptions to Filing Requirements Regarding Supervisory Institutions," SP-37a, March 7, 1985, at 1. The policy statement acknowledged: "The basic purpose in granting forbearances is to give realistic incentives to potential acquirors of problem institutions." *Id.* at 2.

Congress was aware that the FSLIC was using forbearances and other devices as tools to resolve the thrift crisis. For example, in passing the Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, 101 Stat. 552 ("CEBA"), Congress directed the FHLBB to promulgate regulations providing that certain federally-chartered thrifts may "be allowed to continue to operate and be eligible for capital forbearance" if certain conditions were met. CEBA § 404, 101 Stat. 552, 609-11, *repealed by* FIRREA § 301, 103 Stat. 183, 277-354. CEBA provided similar authority to the FSLIC for state-chartered thrifts. CEBA § 416, 101 Stat. 552, 611-13, *repealed by* FIRREA § 407, 103 Stat. 183, 363. Furthermore, in CEBA Congress legislatively recognized and extended certain forbearances and other capital requirement rights provided by the FSLIC to acquirors in emergency thrift acquisitions under § 408(m) of the National Housing Act for a five-year period if certain conditions were met. CEBA § 414, 101 Stat. 552, 621-22, *repealed by* FIRREA § 407, 103 Stat. 183, 363. Thus, it was clear government policy, both administratively and Congressionally, to provide contractually-binding forbearances and other capital rights to the acquirors of thrifts in appropriate circumstances.

B. The Respondents' Vested Contract Rights Concerning Goodwill Were Breached, for Which the Government Cannot Escape Liability.

The Federal Circuit in the decision under review, and the Court of Federal Claims below, found that the Respondents had entered into binding government contracts that granted Respondents vested contract rights concerning the accounting treatment of goodwill. *Winstar Corp. v. United States*, 64 F.3d 1531, 1540-43 (Fed. Cir. 1995) (en banc); *Statesman Sav. Holding Corp. v. United States*, 26 Cl. Ct. 904, 911-12 (1992); *Winstar Corp. v. United States*, 25 Cl. Ct. 541, 548 (1992); *Winstar Corp. v. United States*, 21 Cl. Ct. 112, 114-17 (1990).

Numerous other related cases in the federal courts have also involved similar contracts. *See, e.g., Far West Fed. Bank, SB v. Director, OTS*, 951 F.2d 1093, 1095 (9th Cir. 1992) (assuming contract exists); *Guaranty Fin. Servs., Inc. v. Director, OTS*, 742 F. Supp. 1159, 1161 (M.D. Ga. 1990) (same), *rev'd on other grounds*, 928 F.2d 994 (11th Cir. 1991); *Far West Fed. Bank, SB v.*

Director, OTS, 738 F. Supp. 1559, 1562 (D. Or. 1990) (same), *rev'd on other grounds*, 951 F.2d 1093 (9th Cir. 1991); *Far West Fed. Bank, SB v. Director, OTS*, 746 F. Supp. 1042, 1045 (D. Or. 1990) (same), *rev'd on other grounds*, 951 F.2d 1093 (9th Cir. 1991); *Carteret Sav. Bank, FA v. OTS*, 762 F. Supp. 1159, 1173 (D.N.J. 1991) (finding a contract to exist), *vacated on other grounds*, 963 F.2d 567 (3d Cir. 1992); *Hansen Sav. Bank v. OTS*, 758 F. Supp. 240, 246 (D.N.J. 1991) (same); *Security Sav. and Loan Ass'n v. Director, OTS*, 761 F. Supp. 1277, 1279 (S.D. Miss. 1991) (same), *modified on other grounds*, 960 F.2d 1318 (5th Cir. 1992); *Security Fed. Sav. Bank of Florida v. Director, OTS*, 747 F. Supp. 656, 658 (N.D. Fla. 1990) (same); *Franklin Fed. Sav. Bank v. Director, OTS*, 1990 U.S. Dist. LEXIS 20147, *2 (E.D. Tenn. 1990) (same), *rev'd on other grounds*, 927 F.2d 1332 (6th Cir. 1991); *Sterling Sav. Ass'n v. Ryan*, 751 F. Supp. 871, 878 (E.D. Wash. 1990) (same), *vacated on other grounds*, 1992 U.S. App. LEXIS 6982 (9th Cir. 1992). *See also Franklin Fed. Sav. Bank v. Director, OTS*, 927 F.2d 1332, 1345 (6th Cir.) (Contie, J., dissenting), *cert. denied*, 112 S. Ct. 370 (1991).

By contrast, courts have rarely found against thrifts that have claimed to have binding contract rights relating to goodwill or other regulatory forbearances, and when they did, the decisions were based on unique facts that are distinguishable from the facts underlying Respondents' goodwill accounting agreements. *Charter Fed. Sav. Bank v. OTS*, 976 F.2d 203 (4th Cir. 1992) (clearly distinguishing facts in that case concerning contract formation from the relevant facts of the case before the Court), *cert. denied*, 507 U.S. 1004 (1993); *Guaranty Fin. Servs., Inc. v. Ryan*, 928 F.2d 994, 998 (11th Cir. 1991) (express provision in contract permitted government to alter regulatory requirement concerning accounting treatment of goodwill); *Flagship Fed. Sav. Bank v. Wall*, 784 F. Supp. 742, 748 (S.D. Cal. 1990) (no contract based on facts

distinguishable from the relevant facts of the case before the Court). *Cf. Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52, 54-55 (1986) ("*POSSE*") (holding that non-vested rights pursuant to statute that are not obtained pursuant to consideration are not enforceable contract rights; thus, government can revoke such rights at any time without liability).

The government sought certiorari on matters of principle and importance: the Federal Circuit's alleged failure to apply the unmistakability doctrine; the authority of the regulators to enter into contracts; the sovereign acts doctrine; and the magnitude of the pending claims of other thrifts such as Respondents and LISB. However, once before the Court, the government has switched the thrust of its arguments to question whether in fact the Respondents entered into agreements concerning goodwill that constitute legally binding contracts.

The Court has expressly ruled on numerous occasions that it does not grant certiorari simply to review a lower court's determination of relevant facts, including the construction of a contract. *United States v. Johnston*, 268 U.S. 220, 227 (1925); *Baker v. Schofield*, 243 U.S. 114, 118 (1916); *United States v. O'Donnell*, 303 U.S. 501, 508 (1938); R. Stern *et al.*, Supreme Court Practice § 4.14, at 189 (7th ed. 1993) ("The Supreme Court will usually deny certiorari when review is sought of a lower court decision which turns solely . . . upon the construction of particular contracts or written instruments."). The Court has been particularly reluctant to "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Tank & Mfg. Co. v. Linde Air Prod. Co.*, 336 U.S. 271, 275 (1949) (citing *Baker*, 243 U.S. at 118) (holding that the court will not "disturb" a ruling on the construction of a contract "when [the] two courts [below] have reached the same conclusion."), *aff'd*, 339 U.S. 605 (1950).

The government in its petition for certiorari did not indicate, when it listed the three questions it presented for

Court review, that the existence of contracts between the Respondents and the government would be an issue on which it would spend its principal briefing effort. It is improper to first raise this fact-bound issue at the briefing stage. The Respondents are now compelled to address these issues in their responding briefs, thereby impairing the Respondents' ability fully to respond to the government's legitimately-presented (but also erroneous) arguments. Moreover, it is possible that certain important, even critical, documenatry evidence relating to the contracts may not have been included in the Joint Appendix provided to the Court.

Nevertheless, the government's attacks on the Respondents' acquisition agreements are without weight. These agreements are commercial contracts to which the government is a party in its capacity as a commercial contractor. *See Horowitz v. United States*, 267 U.S. 458, 461 (1925) (quoting *Jones v. United States*, 1 Cl. Ct. 383, 384 (1965)) (" '[I]n this court, the United States appear simply as contractors; and they are to be held liable only within the same limits that any other defendant would be in any other court.' ").

As such, the government is not permitted to escape liability for monetary damages as a result of its breach of goodwill accounting obligations. *See Lynch v. United States*, 292 U.S. 571, 576, 580 (1934) (contractual duties of the United States "are governed generally by the law applicable to contracts between private individuals. . . . To abrogate contracts, in the attempt to lessen government expenditure, would not be the practice of economy, but an act of repudiation."); *Perry v. United States*, 294 U.S. 330, 350 (1935) (the government is not "free to . . . alter the terms of its obligations in case a later Congress finds their fulfillment inconvenient"); *POSSE*, 477 U.S. at 52 (valid government contracts backed by substantial consideration create enforceable property rights); *Sinking-Fund Cases*, 99 U.S. 700, 719 (1878)

("The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.").

II. THE SOVEREIGN ACTS DOCTRINE DOES NOT EXCUSE THE GOVERNMENT FROM LIABILITY BECAUSE FIRREA'S TERMS CONCERNING GOODWILL DO NOT UNAMBIGUOUSLY ABROGATE PRE-EXISTING VESTED CONTRACT RIGHTS AND THUS CANNOT BE GIVEN RETROACTIVE EFFECT.

The government, in its brief, invokes the sovereign acts doctrine to excuse the government from any liability under the Respondents' goodwill accounting agreements. Pet. Br. at 43-46. As the government explains, the "primary qualification on the doctrine is that the sovereign act relied upon to excuse performance be a 'public and general' one." *Id.* at 44. The government concedes that, if the sovereign act is not public and general, and merely enables the government to evade contractual obligations, the doctrine is inapplicable and "the government's breach is actionable." *Id.* at 44.[3] Moreover, the sovereign acts doctrine requires that the sovereign act be unrelated and incidental to the private contract rights that were abrogated. *See Horowitz*, 267 U.S. at 461.

---

[3] In the Federal Circuit's view, FIRREA was not a public and general act of the kind that would permit application of the sovereign acts doctrine. *Winstar Corp.*, 64 F.3d at 1550. The Federal Circuit found that FIRREA itself phased out the use of supervisory goodwill and thereby specifically breached the government's obligations contained in the Respondents' acquisition agreements. *Id.* at 1549-50. However, the Federal Circuit reached this conclusion only after a thorough review of the relevant legislative history of FIRREA. *Id.* at 1549-50. In addition, because the Federal Circuit rejected the applicability of the sovereign acts doctrine on this ground, it was not required to decide the issue of whether the Court's clear statement rule on retroactivity should be applied when construing FIRREA's effect on prior vested contract rights concerning goodwill.

As demonstrated below, Congress did not unambiguously establish, in the statutory text and legislative history of FIRREA, that FIRREA's goodwill rules were to have retroactive effect and override previously agreed upon contractual terms concerning goodwill set forth in the Respondents' acquisition agreements. Thus, the Office of Thrift Supervision's (the "OTS's") improper agency action to breach its contractual obligations concerning goodwill, on the alleged ground that FIRREA required such agency action,[4] directly conflicts with this Court's "clear statement" rule that retroactive abrogation of prior contract rights by Congressional statute will only be recognized if Congress calls for such abrogation clearly and unambiguously.

Under these circumstances, the sovereign acts doctrine obviously cannot excuse the government for breach of the Respondents' acquisition agreements. Congress, with FIRREA, did not enact a "public and general" law that had an unrelated, collateral effect of abrogating vested contract rights. Moreover, the OTS's improper interpretation of FIRREA to abrogate the Respondents' vested goodwill rights obviously cannot itself constitute a public and general act having an unrelated, collateral effect on such rights; the OTS's action instead, by its own admission, was directly targeted at breaching these rights.

A. The "Clear Statement" Rule Concerning Retroactivity Is Applicable to the Construction of FIRREA.

It is well-established by this Court that when Congress intends to upset previously settled expectations, including vested contract rights held by private parties to government contracts, Congress must indicate its intent that a law have retroactive effect in unambiguous terms. *Landgraf v. USI Film Prod.*, 114 S. Ct. 1483, 1505 (1994); *Georgetown*, 488 U.S. at 208. This "clear statement" rule derives from the general proposition that Congress will not be ascribed intentions that have potentially serious, harmful or unsettling effects—such as the destruction of pre-existing vested contract or property rights—unless Congress expresses the intent to do so clearly and expressly in the statutory text. As this Court has ruled:

> Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.

Georgetown, 488 U.S. at 208 (citing *Greene v. United States*, 376 U.S. 149, 160 (1964); *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141, 164 (1944); *Miller v. United States*, 294 U.S. 435, 439 (1935); *United States v. Magnolia Petroleum Co.*, 276 U.S. 160, 162-63 (1928)).

The Court also has explained when to apply a statute retroactively where the statute purports to grant administrative rule-making authority:

> By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. *See Brimstone R. Co. v. United States*, 276 U.S. 104, 122 (1928) ("The power to require readjustments for the past is drastic. It . . . ought not to be extended so as to permit unreasonably harsh action without very plain words"). Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.

Georgetown, 488 U.S. at 208-09.

Moreover, in applying the clear statement canon to the issue of a statute's retroactivity, the deference typically

[4] It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

applied by courts to agencies in interpreting a statute is not applicable. *Transohio Sav. Bank v. Director, OTS*, 967 F.2d 598, 614 (D.C. Cir. 1992) (citing *National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1571 (D.C. Cir.), *cert. denied*, 484 U.S. 869 (1987)) ("In *National Fuel Gas*, Judge Bork explained for the Court that 'deference might lead a court to endorse self-serving views that an agency might offer in a post hoc reinterpretation of its contract.' "). *Cf. Georgetown*, 488 U.S. at 213 ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate.").

The Court most recently addressed the appropriate application of this clear statement canon in *Landgraf*. In analyzing the retroactive effect of amendments to the Civil Rights Act, the Court prescribed the following framework to determine whether a Congressional statute should be applied retroactively: [5]

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted . . . or impose new duties with respect to transactions already completed. If the statute would

[5] The Court in *Landgraf* explained that its clear statement canon concerning retroactivity is based primarily on two policy rationales. First, the Court indicated that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." Second, the Court expressed its justifiable concern that Congress, in response to political pressure, "may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Landgraf*, 114 S. Ct. at 1497.

> operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Id. at 1505.

In *Landgraf*, the Court then went on to determine that the statute at issue did not provide express instructions concerning retroactivity but would have retroactive effect if applied by impairing the rights of private parties. The Court refused to apply the statute at issue retroactively and concluded that it found "no clear evidence of congressional intent" to justify such retroactive application. The Court also indicated that a statute will not be read retroactively to modify the right to recover money damages (whether by increasing or decreasing the amount recoverable), unless Congress provides a clear statement to that effect. *Id.* at 1507 n.37 ("The *extent* of a party's liability, in the civil context as well as the criminal, is an important legal consequence that cannot be ignored . . . '[r]etroactive modification' of damage remedies may 'normally harbo[r] much less potential for mischief than retroactive changes in the principles of liability,' . . . but that potential is nevertheless still significant." (citations omitted) (emphasis in original)).

Significantly, under *Landgraf*, if the statutory text enacted by Congress does not clearly mandate retroactive abrogation of pre-existing rights, reliance on legislative history to overcome such lack of clear intent in the text is rarely, if ever, justified.[6] Otherwise, this clear statement rule is eviscerated; the Court would then simply be apply-

[6] The Court in *Landgraf*, while conducting a cursory review of legislative history, essentially treated it as unreliable:

> The legislative history discloses some frankly partisan statements about the meaning of the final effective date language, but those statements cannot plausibly be read as reflecting any general agreement.

Id. at 1495.

ing, in determining whether a statute should be applied retroactively, ordinary statutory interpretation rules, rather than the special clear statement rule, to determine the intended meaning and effect concerning the retroactivity of an ambiguous statute.[7] The clear statement retroactivity rule has long required that the clear statement of Congressional intent reside primarily in the text of the statute subject to interpretation. *See Landgraf*, 114 S. Ct. at 1522-23 (Scalia, J., concurring) (citing *United States v. Heth*, 3 Cranch 399, 408 (1806) (Johnson, J.) ("Unless therefore, the words are too imperious to admit of a different construction, [the Court should] restrict the words of the law to a future operation"); *Id.* at 414 (Cushing, J.) ("It [is] unreasonable, in my opinion, to give the law a construction, which would have such a retrospective effect, unless it contained express words to that purpose"); *Murray v. Gibson*, 15 How. 421, 423 (1854) (statutes do not operate retroactively unless "required by express command or by necessary and unavoidable implication"); *Schwab v. Doyle*, 258 U.S. 529, 537 (1922) ("a statute should not be given retrospective operation unless its words make that imperative")).

[7] Justice Scalia's concurring opinion in *Landgraf* (joined by Justices Kennedy and Thomas) cautions that a clear statement concerning retroactive application of a statute must be supplied by the statutory text and not by a resort to legislative history, lest the clear statement rule be converted into a "discernible legislative intent" rule. Justice Scalia then indicates his view that the clear statement test for retroactivity precludes reference to legislative history and that this rule was not changed by the majority Court's reference to legislative history in its opinion:

> If it is a "clear statement" we are seeking, surely it is not enough to insist that the statement can "plausibly be read as reflecting general agreement"; the statement must clearly reflect general agreement. No legislative history can do that, of course, but only the text of the statute itself. That has been the meaning of the "clear statement" retroactivity rule from the earliest of times.

Id. at 1522 (Scalia, J., concurring).

Numerous other cases specifically indicate that a statute must not be read lightly to abrogate pre-existing contract rights. *The Twenty Per Cent Cases*, 87 U.S. (20 Wall.) 179, 187-88 (1883) ("there is not a word in the repealing act to support the conclusion that Congress intended to rescind any antecedent contract, or to enact any bar to the right of recovery in such cases where the service had been faithfully performed before the repealing act was passed."); *Chew Heong v. United States*, 112 U.S. 536, 559 (1884) (the Court will not give a statute retrospective operation if it injures "rights previously vested . . . unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature"); *United States Fidelity & Guar. Co. v. United States*, 209 U.S. 306, 314 (1908) (a statute will not be read to abrogate pre-existing contract rights "unless the words used are so clear, strong and imperative that no other meaning can be annexed to them" and "ought not to receive such a construction if it is susceptible to any other"); *United States v. Security Indus. Bank*, 459 U.S. 70, 79 (1982) ("retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be the 'unequivocal and inflexible import of the terms'" (citations omitted)). *See also* J. Kent, 1 Commentaries on American Law 455-56 (1854) (remedial statutes may have retroactive effect "provided they do not impair contracts, or disturb absolute vested rights").

B. FIRREA Does Not Expressly Abrogate Vested Contract Rights Concerning Goodwill.

An analysis of the terms of FIRREA reveals that Congress enacted no express provision requiring the OTS to extinguish, retroactively, (i) the vested contract rights of the Respondents (and other thrifts) concerning the recognition of supervisory goodwill or (ii) the right of Respondents to recover money damages as a remedy for breach of such vested rights.[8]

[8] If the Court determines that Congress did not, with FIRREA, *require* the OTS to breach the vested goodwill rights of the Re-

FIRREA did establish a schedule to reduce, over several years, the recognition of supervisory goodwill as contributing to a thrift's capital requirements, apparently applicable "uniformly" to thrifts. FIRREA § 301 (amending 12 U.S.C. § 1464(t)(3)(A)).[9] FIRREA also provided in § 301 that OTS had limited discretion to waive certain minimum capital levels required by Congress on a "case-by-case" basis. FIRREA § 301 (amending 12 U.S.C. § 1464(t)). In addition, thrifts that were not in compliance with capital standards were permitted to apply for an OTS exemption from certain capital standards or from penalties for noncompliance that OTS might otherwise impose. FIRREA § 301 (amending 12 U.S.C. § 1464(t)(7)).

However, § 301's scheduled general phase-out of goodwill is not sufficient to justify a conclusion that, by implication, Congress intended to abrogate the terms of the Respondents' acquisition agreements. For example, pre-FIRREA capital requirements applying to "all" thrifts also existed in the law; yet, such requirements were frequently waived by the OTS and were not indicative of the actual capital requirements that applied to thrifts.[10] *See* 12 U.S.C. § 1464(t) (repealed 1989).

---

spondents and other thrifts, federal district courts theoretically could grant injunctive relief and require the OTS to specifically perform its acquisition agreements with thrifts by recognizing such goodwill rights. However, because several years have passed since the OTS breached the acquisition agreements, many thrifts have been placed in receivership or have taken other irreversible steps to compensate for the OTS's breach. Thus, virtually all affected thrifts, including Respondents and LISB, seek money damages rather than injunctive relief as the remedy for the OTS's breach.

[9] The transition rules in § 301 provided for a phase-out of goodwill as a component of regulatory capital over five years and restricted amortization of goodwill to no more than 20 years. FIRREA § 301 (amending 12 U.S.C. §§ 1464(t)(3)(A), (t)(9)(B)).

[10] Other than as possibly set forth by implication in § 301, FIRREA is silent with respect to the intended retroactive effect of

On the other hand, a compelling argument can be made that Congress enacted FIRREA's "savings clauses" to preserve the contractual rights concerning goodwill set forth in the Respondents' acquisition agreements. Under Title IV of FIRREA, entitled "Transfer of Functions, Personnel and Property," Congress abolished the FSLIC and the FHLBB and enacted savings clauses providing that the abolition of these agencies "shall not affect the validity of any right, duty, or obligation" of the United States, including the FSLIC or the FHLBB, which "existed on the day before the date of the enactment of this Act." FIRREA §§ 401(f), (g) (12 U.S.C. § 1437 note). Savings clauses are entitled to broad construction. *De La Rama S.S. Co. v. United States*, 344 U.S. 386, 389-90 (1953).

The general federal savings statute also should be read to preserve the validity of the Respondents' goodwill accounting rights. In *De La Rama*, the Court applied the general federal savings statute, set forth at 1 U.S.C. § 109, to conclude that, even if Congress repeals a statute pursuant to which a prior contractual obligation of the government was created, the government remains liable under that obligation unless Congress expressly provides otherwise in the text of the repealing statute. *Id.* at 388-89. Section 109 provides that:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or *liability* incurred under such statute, *unless the repealing Act shall so expressly provide*, and *such statute shall be treated as still remaining in force* for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

1 U.S.C. § 109 (emphasis added).

The Court applied § 109 in *De La Rama* to hold that a government contractor was entitled to money damages

---

the goodwill requirements on the acquisition agreements or on the right to recover money damages for breach of such agreements.

from the United States when Congress repealed the statute pursuant to which the relevant contract was created.[11] This case is indistinguishable from *De La Rama*. Two federal statutory provisions repealed by FIRREA—12 U.S.C. §§ 1725(c)(3) and 1729(f)(2)(A)(iii)—had authorized FSLIC to enter into binding acquisition agreements with Respondents, the LISB and other healthy thrifts. Yet, FIRREA did not "expressly provide" that such repeal "shall have the effect to release or extinguish any . . . liability [of the government] incurred under" the two provisions repealed by FIRREA. Thus, it follows inexorably from the Court's ruling in *De La Rama* that, notwithstanding Congress' later repeal via FIRREA of the FSLIC's statutory authority to enter into binding acquisition agreements, the government's goodwill obligations under such contracts survive such repeal.

By contrast, Congress enacted express language elsewhere in FIRREA that the Federal Deposit Insurance Corporation (the "FDIC"), when acting as conservator or receiver of a failed thrift, could repudiate prior contract or lease obligations not of the FSLIC but of the thrift itself. FIRREA § 212(a) (amending 12 U.S.C. § 1821(e)). Thus, within the four corners of the same legislation, Congress obviously demonstrated an understanding of how to indicate—without any ambiguity—its intent to abrogate contract rights retroactively or to limit the right to recover

[11] The Court explained that § 109:

> lays down a general rule regarding the implications for existing rights of the repeal of the law which created them. It embodies a principle of fair dealing. When the Government has entered upon a conventional commercial endeavor, such as the insurance business, it as much offends standards of fairness for it to violate the principles of [§ 109] as for prviate enterprise to do so.

De La Rama, 344 U.S. at 389.

money damages for breach.[12] The absence of such express language in § 301 (amending 12 U.S.C. § 1464), the provision that established the rules concerning recognition of goodwill, strongly suggests that Congress simply could not, perhaps in the interest of political compromise,[13] expressly authorize the OTS to abrogate vested contract rights concerning goodwill.[14] *See O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048, 2054 (1994) (Court relies on the specificity of the language of § 1821(e) to demonstrate that "creat[ing] additional 'federal common-law' exceptions is not to 'supplement' [FIRREA], but to alter it."). *Cf. Georgetown*, 488 U.S. at 213 (failure of Congress explicitly to authorize retroactive application of one rule when it explicitly authorized retroactive action of another rule "weighs heavily against the [agency's] position").

It is certainly reasonable to read § 401 of FIRREA (12 U.S.C. § 1437 note) and 1 U.S.C. § 109 as preserving the Respondents' goodwill rights under their acquisition agreements.[15] In fact, virtually every federal district and

[12] FIRREA expressly acknowledged that the parties to these repudiated thrift contracts or leases were entitled to some recovery of money damages arising from the repudiation. FIRREA § 212(a) (amending 12 U.S.C. § 1821(e)(8)). That Congress failed to provide parallel guidance concerning money damages upon abrogation of goodwill accounting agreements suggests that Congress did not mandate that such agreements be abrogated.

[13] One possibility is that Congress was unable to resolve the retroactivity issue with clarity and thus "viewed the matter as an open issue to be resolved by the Courts." *See Landgraf*, 114 S. Ct. at 1494.

[14] In addition, in § 501 of FIRREA, a section relating to the Resolution Trust Corporation ("RTC"), FIRREA explicitly withheld authority for the RTC to repudiate pre-existing assistance agreements, including agreements concerning goodwill. This again indicates that Congress clearly expressed its intent regarding retroactive repudiation of vested contract rights when it was politically feasible to do so.

[15] By no means does this reading of § 301 render this provision without effect. Thrift regulators had extended to a number of

circuit court analyzing the statutory text of FIRREA has concluded either that (i) § 401 of FIRREA (12 U.S.C. § 1437 note) expressly preserves thrifts' goodwill rights under valid acquisition agreements [16] or (ii) FIRREA's statutory text is simply inconclusive and provides no clear guidance as to whether Congress intended to abrogate the government's contractual obligations concerning goodwill.[17] We are aware of only one case that squarely faced

---

thrifts the right to count goodwill toward their capital requirements in a gratuitous exercise of agency discretion. With respect to these thrifts, the bank regulators could simply revoke these non-vested rights concerning goodwill at any time without liability. *Winstar Corp.*, 64 F.3d at 1546; *Winstar Corp.*, 25 Cl. Ct. at 545-46 (citing *Estate of Samuel E. Bogley v. United States*, 206 Cl. Ct. 695, 704-05 (1975); Restatement (Second) of Contracts § 71(1) (1981); 17 C.J.S. Contracts § 34). It is perfectly proper to assume that Congress provided a transition period to phase-out these gratuitous rights concerning goodwill. *Cf. POSSE*, 477 U.S. at 55-56 (in which the Court ruled that gratuitous rights granted by the government to private parties without contractually-binding consideration could be revoked without liability). Of course, the Respondents' rights to apply goodwill toward capital requirements were obtained under acquisition agreements supported by consideration and thus constituted vested contract rights. *Winstar Corp.*, 64 F.3d at 1546; *Winstar Corp.*, 25 Cl. Ct. at 545-46.

[16] *See Hansen Sav. Bank*, 758 F. Supp. at 246 (holding that section 401(g) of FIRREA preserves goodwill agreements); *Security Sav. and Loan*, 761 F. Supp. at 1284 (same); *Guaranty Fin. Servs.*, 742 F. Supp. at 1162 (same); *Security Fed.*, 747 F. Supp. at 659 (same); *Far West Fed.*, 738 F. Supp. at 1563 (same); *Far West Fed.*, 746 F. Supp. at 1047 (confirming position taken in previous decision that FIRREA preserves goodwill agreements); *Franklin Fed.*, 1990 U.S. Dist. LEXIS at *3 (FIRREA does not abrogate forbearances); *Sterling Sav.*, 751 F. Supp. at 880 (holding that FIRREA did not abrogate goodwill agreements or give the OTS the power to do so). *See also Franklin Fed.*, 927 F.2d at 1343 (Contie, dissenting) (stating that the statute unambiguously preserved goodwill agreements in section 401).

[17] At least seven courts including the Third, Fourth, Sixth, Ninth and Eleventh Circuits, have ruled that FIRREA's statutory text is ambiguous as to whether goodwill agreements are abrogated or preserved. *See, e.g., Carteret Sav. Bank, FA v. OTS*, 963 F.2d 567, 578 (3d Cir. 1992) (stating that "the statutory language relied upon by [the agency] is not conclusive"); *Charter Fed.*, 976 F.2d at 210 (accepting the analysis of the lower court and other circuit courts, which found that FIRREA is ambiguous); *Franklin Fed.*, 927 F.2d at 1341 (implying that the statute is subject to more than one reasonable interpretation); *Far West Fed.*, 951 F.2d at 1097 (relying on legislative history and the purposes for which FIRREA was enacted, as well as "the language and structure of FIRREA," to support a construction of the act that the statute abrogates the contracts); *Guaranty Fin. Servs.*, 928 F.2d at 1003 (stating that "[the court] conclude[s] that the statute is ambiguous on the question of whether contractual forbearances are abrogated or saved."); *Carteret Sav. Bank*, 762 F. Supp. at 1176 (stating that "[t]his Court has already determined that the statute in question is ambiguous."); *Charter Fed. Sav. Bank v. Director, OTS*, 773 F. Supp. 809, 823 (1991) ("This court does not believe Congress' intent regarding the use of supervisory goodwill is so clear that the interpretation chosen by the OTS is the only one possible."), *modified*, 976 F.2d 203 (4th Cir. 1992).

the issue of whether FIRREA expressly abrogates vested contract rights concerning goodwill and found that the text of the statute unambiguously directs such abrogation. *See Transohio Sav. Bank v. Director, OTS*, 967 F.2d at 614 ("In our view, FIRREA's language clearly conveys Congress' intention to apply the new capital rules to all thrifts, including those with forbearance agreements").[18]

While several federal circuit courts subsequently rely on individual statements of members of Congress to con-

---

[18] The court in *Transohio* failed to address, and presumably overlooked, the distinct possibility that FIRREA's provisions revoking the right to treat goodwill toward capital requirements applied only to such rights granted by bank regulators gratuitously and not to contractually-binding goodwill rights supported by consideration. *See, supra*, note 14. In addition, because the court only affirmed the lower court's determination of the *likelihood* of success on the merits in the context of a preliminary injunction motion, the court's ruling has only limited precedential value. Moreover, the D.C. Circuit later expressly ruled that the *Transohio* decision left open the issue of the retroactive effect of FIRREA's goodwill provisions on claims for contractual damages. *See Transcapital Fin. Corp. v. Director, OTS*, 44 F.3d 1023, 1026 (D.C. Cir. 1993) (later proceeding in same case).

clude that it is more reasonable (in choosing among more than one reasonable alternative) to conclude that Congress intended to abrogate pre-existing contract rights concerning goodwill, that result derives from an application of the general rules of statutory interpretation in the ordinary course, and not from an application of this Court's special clear statement rule governing retroactivity as set forth in *Landgraf*.[19]

---

[19] FIRREA's legislative history is hardly unambiguous. Senate reports provide no guidance at all on the issue of retroactive application of the goodwill restrictions. In addition, the report of the House Banking Committee, the House committee principally responsible for drafting FIRREA, is silent on this issue, as is the more important House/Senate Conference Committee report. Thus, to conclude that FIRREA abrogated retroactively vested contract rights concerning goodwill, the federal circuit courts were forced to rely on (i) politically-motivated comments of individual House members that were attached to the House Banking Committee Report and (ii) on a House rejection of an amendment offered by Rep. Hyde that would have provided for administrative review on a case by case basis of whether breach of an acquisition agreement was justified. As this Court counseled in *Landgraf*, statements from individual members are "frankly partisan" and cannot be read to reflect "any general agreement." 114 S. Ct. at 1495. Further, the court has rejected agency reliance on statements in Congressional committee reports stating that "it is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means." *NLRB v. Healthcare & Retirement Corp.*, 114 S. Ct. 1778, 1784 (1994).

As for the Hyde amendment, its rejection does not indicate a clear Congressional view that contract rights concerning goodwill are to be abrogated retroactively. It is equally conceivable that the amendment was rejected because it was unnecessary to grant thrifts a separate right to have a hearing, since thrifts that were party to an acquisition agreement always would be able to seek judicial relief for any breach of such agreement. *See* Department of Justice Letter to Chairman of House Banking Committee dated June 12, 1989 (prior to enactment of FIRREA) ("[T]here is no need to amend FIRREA to provide special hearings on the claims before imposition of the new capital requirements. The federal courts are available to resolve constitutional and contractual claims presented by adversely affected thrifts.").

Even if the government were correct in arguing that a more reasonable interpretation of FIRREA, based on legislative history, is that Congress intended to abrogate vested contract rights contained in the Respondents' acquisition agreements, the government would not thereby meet its burden here. First, the government must satisfy the higher standard established by the Court's clear statement retroactivity rule by demonstrating that FIRREA expressly and clearly calls for retroactive application to vested contract rights concerning goodwill.[20] As the virtually unanimous judgments of numerous federal district and circuit courts confirm, such an unambiguous interpretation of FIRREA is simply not justified or reasonable.

Second, FIRREA is silent with respect to the Respondents' right to money damages for the government's breach of the Respondents' goodwill accounting rights. Nor is there any indication in FIRREA's legislative history that suggests any clear Congressional intent to abolish the Respondents' contractual rights to money damages as a consequence of such breach.[21] Therefore, even if the Court's

---

[20] Obviously, if a statute's *text* is unclear as to its retroactive effect on vested contract rights, it is highly unlikely that relevant legislative history—notoriously subject to a wide range of interpretations based on different motivations—will sufficiently "clarify" a statute to allow it to destroy existing contract rights retroactively. The Court has admonished that "[i]f the absence of such determining declaraction [concerning retroactive applicability] leaves to the statute a double sense, it is the command of the cases, that that which rejects retroactive application must be selected." *Schwab*, 258 U.S. at 534-35.

[21] In fact, at least on House Banking Committee member believed that the government *would* remain liable for money damages upon breach of thrift acquisition agreements. *See* H.R. Rep. No. 101-54, 101st Cong., 1st Sess., pt. 1, at 507-08 (1989) (Rep. LaFalce). ("[Thrift acquisition agreements] generally state that they cannot be superseded by subsequent regulations. It is a fundamental principle of law that damages are in order when a contract is breached, and those damages may well be more onerous where the contract was induced by the government.").

clear statement standard is met concerning repudiation of these agreements by FIRREA, it remains unsatisfied with respect to the Respondents' right to receive money damages.

Under *Landgraf*, these conclusions should end the inquiry. Without unmistakable Congressional intent to abrogate vested contract rights, including rights to money damages for breach, FIRREA may not be applied retroactively and the sanctity of the Respondents' acquisition agreements must be preserved. Accordingly, the OTS acted without Congressional authorization in specifically breaching the Respondents' vested contract rights concerning goodwill, and the government is not entitled to the protections of the sovereign acts doctrine. *Cf. RTC v. FSLIC*, 25 F.3d 1493, 1501-02 (10th Cir. 1944) (Even if FIRREA does not expressly abrogate vested contract rights concerning goodwill, breach of such rights by the OTS still subjects the government to liability).

CONCLUSION

For the foregoing reasons, LISB urges the Court to affirm the finding of the Court of Federal Claims and the Federal Circuit (en banc) that the government is liable for breach of the Respondents' vested contract rights concerning goodwill.

Respectfully submitted,

RUSSELL E. BROOKS
Counsel of Record
FRED W. REINKE
MILBANK, TWEED, HADLEY
& MCCLOY
1 Chase Manhattan Plaza
New York, N.Y. 10005
(212) 530-5000
Counsel for *Amicus Curiae*

March 29, 1996

No. 95-865

Supreme Court, U.S.
FILED
NOV 29 1996
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Petitioner,
v.
WINSTAR CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

BRIEF OF THE AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, AMERICAN COUNCIL ON EDUCATION, THE CALIFORNIA ASSOCIATION OF HEALTH FACILITIES, ENVIROTEST SYSTEMS CORP., THE FEDERATION OF AMERICAN SOCIETIES FOR EXPERIMENTAL BIOLOGY, AND THE NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND-GRANT COLLEGES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Of Counsel
SHELDON ELLIOT STEINBACH
AMERICAN COUNCIL ON EDUCATION
One Dupont Circle, Suite 835
Washington, D.C. 20036
(202) 939-9355

J. MARK WAXMAN
FOLEY LARDNER WEISSBURG & ARONSON
2049 Century Park East, 32nd Floor
Los Angeles, CA 90067-3271
(310) 277-2223

JOSEPH N. ONEK *
KENT R. MORRISON
ROBERT P. CHARROW
CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2595
(202) 624-2500
Attorneys for Amici Curiae

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

30 pp

QUESTIONS PRESENTED

1. Whether the unmistakability doctrine, which provides that a contract with the government will be interpreted as including a promise by the government not to exercise sovereign regulatory authority only if such a promise is stated in unmistakable terms, is applicable in a breach of contract action in which the plaintiff seeks money damages.

2. Whether, absent a specific congressional authorization to do so, a federal agency has authority to bind itself and its successors by contract to exercise governmental regulatory authority in a particular way, regardless of subsequent legislative changes.

3. Whether the provisions of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, limiting the ability of thrift institutions to use intangible assets to satisfy minimum capitalization requirements, were "public and general acts" for purposes of the sovereign acts doctrine.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. THE REAL ISSUE, WHETHER A LEGISLATURE MAY ABROGATE THE GOVERNMENT'S OWN CONTRACTS, HAS ALREADY BEEN SETTLED	5
II. THE PRINCIPLES ARTICULATED IN THIS COURT'S CONTRACT CLAUSE DECISIONS SUPPORT AFFIRMANCE	7
A. Ordinary Contract Interpretation Principles Apply To Government Contracts	8
1. The Unmistakability Principle Does Not Apply To Financial Obligation Contracts	8
2. In Any Event, Ordinary Rules Of Contract Interpretation Satisfy The Unmistakability Principle	10
B. A Government Has The Authority To Make Contract Obligations Concerning Regulation	16
C. Subsequently Enacted "General" Legislation Will Not Excuse A Pre-Existing Contractual Obligation Of The Government	20
III. GOVERNMENTS CANNOT BE EXCUSED FROM PAYING DAMAGES FOR BREACH OF THEIR OWN CONTRACTS BECAUSE OF FISCAL PRESSURES	22
CONCLUSION	24

TABLE OF AUTHORITIES

CASES

	Page
American Smelting & Refining Co. v. Colorado, 204 U.S. 103 (1907)	17
Appleby v. City of New York, 271 U.S. 364 (1926)	17, 18
Appleby v. Delaney, 271 U.S. 403 (1926)	14
Bridge Proprietors v. Hoboken Co., 68 U.S. (1 Wall.) 116 (1863)	13
Carondelet Canal & Navigation Co. v. Louisiana, 233 U.S. 362 (1914)	21
Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992)	7
City of Detroit v. Detroit Citizens' St. Ry. Co., 184 U.S. 368 (1902)	11, 13
City of Vicksburg v. Vicksburg Waterworks Co., 206 U.S. 496 (1907)	18
City of Walla Walla v. Walla Walla Water Co., 172 U.S. 1 (1898)	13
Columbia Ry., Gas & Elec. Co. v. South Carolina, 261 U.S. 236 (1923)	11
Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986)	18
County of Ralls v. Douglass, 105 U.S. 728 (1881)	19
Detroit United Ry. v. Michigan, 242 U.S. 238 (1916)	21
Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983)	5, 23
Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting)	23
Georgia Ry. & Power Co. v. Town of Decatur, 262 U.S. 432 (1923)	21
Grand Trunk Western Ry. Co. v. City of South Bend, 227 U.S. 544 (1913)	17
Hays v. Port of Seattle, 251 U.S. 233 (1920)	21
Humphrey v. Pegues, 83 U.S. (16 Wall.) 244 (1872)	12, 13, 14
In re Binghamton Bridge, 70 U.S. (3 Wall.) 51 (1865)	12, 13, 14
In re Delaware R.R. Tax, 85 U.S. (18 Wall.) 206 (1873)	15

TABLE OF AUTHORITIES—Continued

	Page
Indiana ex rel. Anderson v. Brand, 303 U.S. 95 (1938)	17, 22
Jessup v. United States, 106 U.S. 147 (1882)	18
Lynch v. United States, 292 U.S. 571 (1934)	5, 21, 23
Mississippi ex rel. Robertson v. Miller, 276 U.S. 174 (1928)	15
Missouri, Kansas & Texas Ry. Co. v. Oklahoma, 271 U.S. 303 (1926)	17
Moses v. United States, 166 U.S. 571 (1897)	18
Murray v. City of Charleston, 96 U.S. 432 (1877)	8, 11, 19
New Jersey v. Yard, 95 U.S. 104 (1877)	11
New Orleans Gas Co. v. Louisiana Light Co., 115 U.S. 650 (1885)	8, 13, 16
O'Melveny & Myers v. Federal Deposit Ins. Co., 114 S. Ct. 2048 (1994)	23
Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633 (1990)	7
Perry v. United States, 294 U.S. 330 (1935)	5, 16, 21, 22
Piqua Branch of State Bank of Ohio v. Knoop, 57 U.S. (16 How.) 369 (1853)	9, 10
Powers v. Detroit, Grand Haven & Milwaukee Ry. Co., 201 U.S. 543 (1906)	12, 13, 15
Russell v. Sebastian, 233 U.S. 195 (1914)	11, 13, 17
St. Anna's Asylum v. City of New Orleans, 105 U.S. 362 (1881)	11, 13
St. Cloud Pub. Serv. Co. v. City of St. Cloud, 265 U.S. 352 (1924)	17
United States v. Bekins, 304 U.S. 27 (1938)	10, 17
United States v. Larionoff, 431 U.S. 864 (1977)	21
United States v. Purcell Envelope Co., 249 U.S. 313 (1919)	23
United States v. Tingey, 30 U.S. (5 Pet.) 115 (1831)	18
United States Trust Co. of New York v. New Jersey, 431 U.S. 1 (1977)	5, 8, 9, 16, 23
Von Hoffman v. City of Quincy, 71 U.S. (4 Wall.) 535 (1866)	12, 17, 19, 20
W.B. Worthen Co. v. Kavanaugh, 295 U.S. 56 (1935)	17, 22

TABLE OF AUTHORITIES—Continued

	Page
W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber Workers of Am., 461 U.S. 757 (1983)	13
Winstar Corp. v. United States, 64 F.3d 1531 (Fed. Cir. 1995) (*en banc*), *cert. granted*, 116 S. Ct. 806 (1996)	6
Wood v. Lovett, 313 U.S. 362 (1941)	12, 17, 22
CONSTITUTION & STATUTES	
U.S. Const. art. I, § 10, cl. 1 (Contract Clause)	*passim*
U.S. Const. art. VI, § 1	22
Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (codified at 12 U.S.C. § 1464, *et seq.* (1989))	6, 7, 21
12 U.S.C. § 1725(c)(3) (1989) (repealed 1989)	6, 17
20 U.S.C. § 1442 (1995)	17
MISCELLANEOUS	
E. Allan Farnsworth, 2 *Farnsworth on Contracts* § 9.6 (1990)	12
The Federalist Papers, No. 15 (Penguin 1987)	22
Alexander Hamilton, 3 *Hamilton's Works*	22
Restatement (Second) of Contracts § 1 (1981)	19
Restatement of Contracts § 1 (1932)	19
Jacob A. Stein et al., 3 *Administrative Law* § 15.02[4][g] (1988)	1
Samuel Williston, 4 *Williston on Contracts* § 628 (3d ed. 1951)	12
Benjamin F. Wright, *The Contract Clause of the Constitution* 93 (1938)	22

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

No. 95-865

UNITED STATES OF AMERICA,
Petitioner,
v.
WINSTAR CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF THE AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, AMERICAN COUNCIL ON EDUCATION, THE CALIFORNIA ASSOCIATION OF HEALTH FACILITIES, ENVIROTEST SYSTEMS CORP., THE FEDERATION OF AMERICAN SOCIETIES FOR EXPERIMENTAL BIOLOGY, AND THE NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND-GRANT COLLEGES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE

The *amici curiae* file this brief principally to emphasize to the Court that far more is potentially at stake in this case than contracts by savings and loans.[1] "[T]he federal government has approximately ten million contracts outstanding at any given time." 3 Jacob A. Stein et al., *Administrative Law* § 15.02[4][g], at 15-16 (1988). It is logical to assume that state and municipal governments

[1] Pursuant to Rule 37, letters of consent have been filed with the Clerk of the Court.

have at least as many contracts as the federal government. As demonstrated herein, the government's unprecedented theories could undermine the reliability of literally millions of federal, state, and municipal contracts.

Amici curiae are or represent academic institutions, scientists or businesses that regularly enter into contracts with government agencies at the federal, state, and local levels to provide essential services in the areas of education, biomedical research, environmental protection, and health care. The abilities of *amici* and their members to rely on the contractual obligations made by their government contract partners enable *amici* and their members to provide valuable services to various governments and the public at reasonable costs without an "uncertainty" premium for the possibility of unilateral government abrogation.

The American Association of State Colleges and Universities ("AASCU"), founded in 1961, represents more than 370 state colleges and universities across the United States and in Puerto Rico, Guam, and the Virgin Islands. AASCU sponsors research and publishes reports containing information on various aspects of higher education. Many of AASCU's members have significant contractual relationships with the federal government, and as state agencies, the members themselves enter into government contracts with private parties that will be affected by the Court's ruling in this case.

American Council on Education ("ACE"), founded in 1918, represents all sectors of American higher education on a nationwide basis. Its members consist of approximately 1,800 institutions, including a substantial majority of public and private colleges and universities in the United States. The principal purpose of ACE is to further the goals of higher education, including the interests of all members of the academic community. Many of ACE's members have significant contractual relationships with federal and state agencies; those members that are

themselves state agencies enter into government contracts with private parties that will be affected by the Court's ruling in this case.

The California Association of Health Facilities is a not-for-profit trade association representing over 860 licensed skilled nursing and intermediate care facilities throughout the State of California. The overwhelming majority of its members participate in both the Medicare and Medicaid programs. The relationship between its member facilities and the State of California, for purposes of their participation in the Medicaid program, is a contractual one.

Envirotest Systems Corp. currently provides centralized vehicle emissions testing services for governments in nine states. Envirotest's contracts require massive up-front capital expenditures and other costs that Envirotest recovers, pursuant to contracts with state entities, through later testing fees. Recently, certain states have enacted legislation that seeks to eliminate or modify the states' own contractual obligations to Envirotest and similar contractors. These states have offered theories why they are not obligated to pay compensatory damages. Their theories are similar in many respects to the arguments of the United States in this case.

The Federation of American Societies for Experimental Biology ("FASEB") is a federation of ten basic biomedical science associations: The American Physiological Society, American Society for Biochemistry and Molecular Biology, American Society for Pharmacology and Experimental Therapeutics, American Society for Investigative Pathology, American Institute of Nutrition, The American Association of Immunologists, The American Society for Cell Biology, Biophysical Society, American Association of Anatomists, and The Protein Society. FASEB's ten member societies have a combined individual membership of over 43,000 scientists, many of whom either directly or through their employing institutions enter into long term research contracts with federal and state agencies.

The National Association of State Universities and Land-Grant Colleges ("NASULGC"), founded in 1887, is the nation's oldest higher education association. Its members include 177 public research universities located in all 50 states, U.S. territories, and the District of Columbia. NASULGC focuses on the benefits and importance of public higher education. Many of NASULGC's members have significant contractual relationships with the federal government, and as state agencies, the members themselves enter into government contracts with private parties that will be affected by the Court's ruling in this case.

Although the instant case concerns federal government contracts, the government's theories and brief implicate contracts with state and local governments as well. If petitioner should prevail, many of the governmental contractual obligations on which *amici* have relied over a long period of time suddenly would become vulnerable to unilateral abrogation by the government parties. Further, the costs to *amici* of entering into contracts with governments in the future would be increased due to the greatly increased uncertainty as to when, if ever, a government entity would truly be legally bound by its contract. Similarly, the costs of contracts entered into by the state universities and colleges represented by *amici* would increase because of the fears of private parties that their contracts will be abrogated by unilateral action of the state legislature.

SUMMARY OF ARGUMENT

The Court should reject the proposition, at the heart of petitioner's argument, that established rules of contract interpretation should be abandoned and replaced with formalistic rules in an effort to assist government attempts to abrogate contractual obligations through subsequently enacted legislation. Issues of the intent to contract and the authority to contract should be interpreted on their own merits, and not in light of *post hoc* rationalizations

designed to sustain subsequently enacted legislation. Nor should a federal common law rule be created such that the characterization of later legislation as "public and general" excuses the government's pre-existing contract obligations.

Petitioner's arguments directly contradict this Court's Contract Clause decisions. These decisions make clear that the unmistakability principle does not apply to financial obligation contracts; that in any event, ordinary rules of contract interpretation satisfy the unmistakability principle; and that the government has the authority to make contractual obligations concerning regulatory issues. There is no support in this Court's Contract Clause cases, or in federal government contract cases, for the implicit premise of the government's argument that government fiscal pressures justify abrogation of government contracts.

ARGUMENT

I. THE REAL ISSUE, WHETHER A LEGISLATURE MAY ABROGATE THE GOVERNMENT'S OWN CONTRACTS, HAS ALREADY BEEN SETTLED.

It is the well settled general rule that neither the federal government nor a state may legislatively abrogate its own contracts. *See, e.g., United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 21-32 (1977); *Perry v. United States*, 294 U.S. 330, 349-54 (1935); *Lynch v. United States*, 292 U.S. 571, 579-80 (1934). This rule is particularly strong when "a governmental unit . . . enters financial or other markets." *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412 n.14 (1983). Here, the government's contracts were the result of its entering "financial or other markets" in that the contracts were designed to induce the respondent thrifts to undertake the government's own financial obligations as an insurer of thrift deposits.

Because of this settled law, the United States does not and cannot argue that FIRREA[2] directly excuses the government from its contractual obligations. Rather, the government seeks to avoid this settled law by asking (a) whether the thrifts had contract rights in the first place, (b) whether the contracts were authorized, and (c) whether federal common law excuses the government from its contractual obligations.

Despite its attempt to obfuscate the nature of the inquiry on each issue, the government implicitly or expressly asks this Court to use FIRREA as a factor excusing its contractual obligations. Each such request is improper. First, the government implicitly asks that the thrifts' contracts—entered into in 1981, 1984, and 1987—be interpreted so as to minimize the monetary cost of the fulfillment of a statute enacted in 1989. *See* Brief for Petitioner at 3-5, 21-22 ("Pet. Br."). Obviously, the Court cannot determine the intent of the government and its thrift contractual partners in 1981, 1984, and 1987 by examining Congress' purposes in 1989. As the Federal Circuit held, "[t]he terms of a government contract, like any other contract, do not change with the enactment of subsequent legislation absent a specific contractual provision providing for such a change." *Winstar Corp. v. United States*, 64 F.3d 1531, 1547 (Fed. Cir. 1995) (*en banc*), *cert. granted*, 116 S. Ct. 806 (1996). Thus, the government's interpretation of the contracts can be sustained only if FSLIC *never* had contractual obligations to recognize goodwill, not even *the day after* the transactions at issue. *See* Pet. Br. at 26.

Similarly, the government asks the Court, at least implicitly, to interpret FSLIC's authority "to make contracts" under 12 U.S.C. § 1725(c)(3) (1989) (repealed

[2] The Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (codified as 12 U.S.C. § 1464, *et seq.* (1989)) ("FIRREA").

1989), in light of "subsequent legislative changes," Pet. Br. at (I), *i.e.*, in light of a statute enacted in 1989. Of course, subsequent legislative purposes provide at best "a 'hazardous basis for inferring the intent of an earlier' Congress." *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (citation omitted).

Finally, although the third question presented addresses the effect of "the provisions of [FIRREA]," Pet. Br. at (I), the government bases its third argument not on the statute's intended effect but on federal common law. The complete answer to the third question presented is that because the Constitution forbids the legislature to abrogate the government's own contracts, the courts cannot create a common law rule that is triggered by the statute and reaches the same result. *See, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521-22 (1992) (constitutional bar to legislation also bars common law rule to the same effect) (plurality opinion of Stevens, J., joined by Rehnquist, C.J., and White and O'Connor, JJ.); *accord id.* at 548-49 (opinion of Scalia, J., joined by Thomas, J.) (concurring in part, dissenting in part) (agreeing with this point).

II. THE PRINCIPLES ARTICULATED IN THIS COURT'S CONTRACT CLAUSE DECISIONS SUPPORT AFFIRMANCE.

Because federal contract case law plainly refutes petitioner's arguments, petitioner turns to case law under the Contract Clause of the U.S. Constitution. U.S. Const. art. I, § 10, cl. 1; *see* Pet. Br. at 17-19, 37-40. However, the Contract Clause cases also refute petitioner's contentions. This Court's Contract Clause cases establish that: (1) ordinary contract interpretation rules apply to contracts with federal, state and local governments, and here those rules satisfy any unmistakability principle; (2) a government is authorized to make contractual obligations that touch upon the kinds of regulatory areas

arguably at issue here, and the government cannot invoke its "reserved powers" in order to escape its own financial obligations; and (3) subsequently enacted legislation, even if "general," will not excuse a government's contractual obligations.

A. Ordinary Contract Interpretation Principles Apply To Government Contracts.

1. *The Unmistakability Principle Does Not Apply To Financial Obligation Contracts.*

As an initial matter, a fundamental flaw in petitioner's argument is that it attempts to apply the unmistakability principle to straightforward financial obligation contracts. The unmistakability principle is simply a requirement that when the government enters into contracts that touch upon its regulatory authority in a particular way, it must express its intent clearly.

However, when the government makes an ordinary *financial* obligation contract, in which it agrees to provide value in consideration for a substantial financial benefit to the government, it is not binding itself to exercise its regulatory powers in any way. The reason for insisting on an unmistakable expression of intent when the government contracts to limit its regulatory authority is absent when all that the government agrees to do is to provide value in exchange for a benefit, as it did in this case. *See United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 24 (1977) ("the power [of a government] to enter into effective financial contracts cannot be questioned"); *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U.S. 650, 672-73 (1885) (payment of compensation does not "obstruct" state sovereignty); *Murray v. City of Charleston*, 96 U.S. 432, 445-46 (1877) (when governments make financial obligation contracts, they "come down to the level of ordinary individuals"). That is precisely what FSLIC did in its contracts with the respondent thrifts. FSLIC made a bargained-for exchange

of goodwill as a capital asset in return for receiving the substantial benefit of the thrifts' assumption of hundreds of millions of dollars of FSLIC's liabilities as insurer of the deposits of the failed financial institutions. Plainly, FSLIC instead could have promised to provide cash in the event that the thrifts' assumption of liabilities caused them to fail to meet future regulatory capital requirements. FSLIC's agreement to recognize goodwill as capital was a cash substitute. Both the contractual context and the specific promises were financial.

In an effort to avoid the fact that FSLIC's contracts were financial obligation contracts, petitioner attempts to collapse the distinction between financial obligation contracts and contracts outside the financial context that bind the government to exercise its regulatory authority in a particular way. Thus, petitioner asserts that when the government is forced to pay damages for breach of contract, "future regulatory action will be deterred." Pet. Br. at 21. This Court rejected a similar proposition in *United States Trust Co. of New York v. New Jersey*, in which it held that:

> [a]ny financial obligation could be regarded in theory as a relinquishment of the State's spending power, since money spent to repay debts is not available for other purposes. Similarly, the taxing power may have to be exercised if debts are to be repaid. Notwithstanding these effects, the Court has regularly held that the States are bound by their debt contracts.

431 U.S. 1, 24 (1977); *see also Piqua Branch of State Bank of Ohio v. Knoop*, 57 U.S. (16 How.) 369, 389-90 (1853).

Ignoring the distinction between financial obligation contracts and contracts outside that context, petitioner's position would mean that virtually every contract with a government infringes sovereign authority. The absurdity of this position is that it turns sovereignty on its head,

improperly transforming what has been recognized as a critical component of sovereign authority—the power to contract—into an infringement of sovereign authority. *See United States v. Bekins*, 304 U.S. 27, 51-52 (1938) ("It is of the essence of sovereignty to be able to make contracts and give consents bearing upon the exertion of governmental power. . . . The State is free to make contracts with individuals and give consents upon which the other contracting party may rely with respect to a particular use of governmental authority"); *Piqua Branch*, 57 U.S. (16 How.) at 389. Stepping back from that position, it is clear that a promise to provide financial value in no way jeopardizes a government's sovereign authority. In contrast to regulatory obligation contracts, there is no basis for applying the unmistakability principle to the government's expression of intent in financial obligation contracts.

2. *In Any Event, Ordinary Rules Of Contract Interpretation Satisfy The Unmistakability Principle.*

The second major flaw in petitioner's argument on the unmistakability principle is that it imports into that principle strained and narrow rules of contract formalism that are nowhere to be found in this Court's Contract Clause jurisprudence. Petitioner would read terms out of government contracts that were explicitly adopted into the contracts by reference, and would convert the contractual adoption of an existing regulation as a fixed term of a contract into a malleable provision changing whenever the government unilaterally changes the law. In addition to turning a blind eye to the plain terms of the contracts at issue, petitioner ignores other evidence of contractual intent, such as the substantial value of the consideration offered and received by the government and extrinsic evidence regarding the government's intent to be bound contractually.

As stated above, the unmistakability principle is simply a means of assuring that the government's contractual intent is clear. In finding the government's intent, as in finding the intent of parties to *any* contract, a court is to apply "a fair and reasonable interpretation" to the terms of the parties' agreement. *Russell v. Sebastian*, 233 U.S. 195, 205 (1914). The unmistakability requirement is thus satisfied if the government's intent "satisfactorily appears" from the terms of the agreement. *Id.* And when, as here, the existence of a contract is beyond dispute and the only question concerns the scope of the contract, this Court has held that it will be particularly reluctant to interpret the contract in a way that would permit unilateral revocation by the government. *Id.* at 204; *see also Columbia Ry., Gas & Elec. Co. v. South Carolina*, 261 U.S. 236, 250 (1923) ("clear implication" or "inference . . . which naturally flows" from the contract as a whole sustains contractor's claim).

Applying ordinary principles of interpretation, this Court has repeatedly declined to strain its reading of contract language in order to find that on a critical term the government only has given a license revocable at the government's pleasure, rather than undertaken a contractual obligation. For instance, in *City of Detroit v. Detroit Citizens' Street Railway Co.*, 184 U.S. 368 (1902), where a railroad company and a city had agreed by contract upon the fare that the railroad could charge, this Court refused to accept the city's suggestion that "a rate once deliberately and mutually agreed upon might be thereafter and from time to time altered at the pleasure of the city alone." *Id.* at 384; *see also Russell v. Sebastian*, 233 U.S. 195, 204 (1914); *Murray v. City of Charleston*, 96 U.S. 432, 445 (1877); *New Jersey v. Yard*, 95 U.S. 104, 116-17 (1877). Similarly, this Court has refused to find that the unmistakability principle requires not only a clear expression of intent to contract but also additional express assurances of the binding nature of a contractual obligation. *See St. Anna's Asylum v.*

City of New Orleans, 105 U.S. 362, 369 (1881) ("The addition of a declaration, that the [tax] exemption given should not be withdrawn, would not have added to its force"); *see also Powers v. Detroit, Grand Haven & Milwaukee Ry. Co.*, 201 U.S. 543, 559 (1906).

Contrary to petitioner's contention, *see* Pet. Br. at 24, under ordinary principles of contract interpretation, which apply in this case, documents referred to in a contract become "part of" the contract. Samuel Williston, 4 *Williston on Contracts* § 628, at 901 (3d ed. 1951). In its decisions under the Contract Clause, this Court has not hesitated to find the government's contractual intent unmistakably expressed when that intent is embodied in a separate document to which other contractual documents refer. *See Humphrey v. Pegues*, 83 U.S. (16 Wall.) 244, 248 (1872); *In re Binghamton Bridge*, 70 U.S. (3 Wall.) 51, 78-79 (1865).

A corollary to the principle of adoption by reference, which also has been articulated in Contract Clause decisions, is that a regulation adopted into a contract becomes fixed in the contract as the regulation is then interpreted. In other words, the regulation as fixed in the contract is not affected by later modification or repeal. *See Wood v. Lovett*, 313 U.S. 362, 369 (1941) (statute under which irregularities in tax sale would not cloud title became fixed term of deed, which term was not affected by repeal of statute); *Von Hoffman v. City of Quincy*, 71 U.S. (4 Wall.) 535, 550 (1866) (terms of contract clearly include existing laws that "were expressly referred to *or* incorporated" in contract) (emphasis added).

The latter principle is in fact an application of general contract rules of risk allocation. Ordinarily, the promisor bears the risk of its own breach. A court should be particularly inclined to find the burden of risk to be on the promisor where the promisor was able to foresee its own possible breach. See E. Allan Farnsworth, 2 *Farnsworth on Contracts* § 9.6, at 555-56 (1990) (foreseeability of

an event is "a factor that suggests that the *promisor* assumed the risk of its occurrence"). Here, the government concedes that a change in government policy that would prevent its own performance was foreseeable when it entered the thrift contracts. *See* Pet. Br. at 26-27. A party bears the risk that its *own* actions and decisions will create a "condition of impossibility." *See, e.g., W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber Workers of Am.*, 461 U.S. 757, 767 n.10 (1983). Most important, this Court's Contract Clause decisions have held that the risk of a change in policy that prevents or otherwise affects the *government's own performance* is allocated to *the government*, and that this allocation is consistent with the unmistakability principle. *See, e.g., New Orleans Gas Co. v. Louisiana Light Co.*, 115 U.S. 650, 672-73 (1885).

In addition to proposing an unreasonably narrow construction of the express terms of the government's contracts with the thrifts and advocating a reversal of established principles of risk allocation, petitioner asks this Court to ignore the evidence of intent indicated by the value of the consideration that the government accepted and received from the private parties. In determining whether a government's contractual intent to undertake a broad obligation was unmistakably expressed, this Court consistently has looked to the value of the consideration that the government accepted and received from the other party to the contract. *See Russell v. Sebastian*, 233 U.S. 195, 206, 208 (1914); *Powers v. Detroit, Grand Haven & Milwaukee Ry. Co.*, 201 U.S. 543, 557 (1906); *City of Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U.S. 368, 384, 398 (1902); *City of Walla Walla v. Walla Walla Water Co.*, 172 U.S. 1, 17 (1898); *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U.S. 650, 662-64 (1885); *Humphrey v. Pegues*, 83 U.S. (16 Wall.) 244, 249 (1872); *In re Binghamton Bridge*, 70 U.S. (3 Wall.) 51, 78 (1865); *Bridge Proprietors v. Hoboken Co.*, 68 U.S. (1 Wall.) 116, 146 (1863). Particularly where a

project could not rationally have been undertaken by a private party without the inducement of a contractual obligation by the government, this Court has been slow to find that no such obligation was made. *See, e.g., St. Anna's Asylum v. City of New Orleans*, 105 U.S. 362, 368-69 (1881); *In re Binghamton Bridge*, 70 U.S. (3 Wall.) 51, 78 (1865).

The rationale behind looking to the value of consideration as evidence of intent is that a private party is very unlikely to bargain for an obligation from the government that is substantially less than equivalent to the value of the benefit bargained for and received by the government. *See In re Binghamton Bridge*, 70 U.S. (3 Wall.) 51, 78 (1865). That rationale is particularly apposite where, as in this case, a private party risks bankruptcy by assuming its burden under a government contract, and the *only* conceivable inducement to enter into the contract is that the government promised consideration equivalent in value to the risk. *See Appleby v. Delaney*, 271 U.S. 403, 413 (1926) (broader interpretation of city's contractual obligation was "much more persuasive" because "[i]t is not reasonable to suppose" that the private parties would "leave to the city authorities the absolute right completely to nullify the chief consideration"). Where a private party would never have been induced to enter a contract but for substantial consideration promised by the government, it is inappropriate to ignore that evidence in interpreting the scope of the consideration that the government agreed to provide in return.

By the same token, because the object is to determine the government's intent, there is no basis for ignoring extrinsic evidence in making that determination. Thus, in *Humphrey v. Pegues*, this Court took note of the fact that no railroad company had developed a particular line for a period of 14 years as evidence of its finding that the government of South Carolina had the unmistakable intent to grant the private party a tax exemption in consideration for developing the line. 83 U.S. (16 Wall.) 244,

248-49 (1872); *see also Powers v. Detroit, Grand Haven & Milwaukee Ry. Co.*, 201 U.S. 543, 559 (1906) (noting "great public importance" of "completion of an unfinished road"). Indeed, it is settled that the Contract Clause protects "an implied contract" with the government. *Mississippi ex rel. Robertson v. Miller*, 276 U.S. 174, 179 (1928). As with evidence of the value of the consideration, there is no basis for petitioner's suggestion that the Court should ignore uncontradicted extrinsic evidence of intent.[8]

Petitioner essentially asks this Court to examine government contracts with blinders on. Under petitioner's theory, a court should not look to terms adopted into a contract by reference, it should not look to the substantial value of the consideration provided by private parties, and it should not look to undisputed extrinsic evidence. There is absolutely no support for any aspect of petitioner's theory of government contract interpretation in this Court's Contract Clause jurisprudence.

If the government's theory were adopted, numerous private parties that provide services to the government in areas such as education, biomedical research, health care, and environmental protection—including *amici* and their members—would be unable to rely on the government obligations set forth in many of their contracts. Further, the costs of entering into contracts with governments in the future would be prohibitive in many cases. Indeed, the costs and uncertainty would drive many private entities, particularly those that are not profit-making institutions, out of the field of contracting with the government

---

[8] The United States miscites out-of-context dictum in *In re Delaware Railroad Tax*, 85 U.S. (18 Wall.) 206, 226 (1873), to the purported effect that the only evidence that can satisfy the unmistakability principle is contract "language." Pet. Br. at 18. In *Delaware Railroad Tax*, no argument in favor of unmistakability was made except one based on the "words" of the state statutory provision by which the contract in that case was allegedly made. 85 U.S. (18 Wall.) at 226.

altogether. The government's formalistic approach would be particularly harmful to smaller entities contracting with the government. Accordingly, this Court should reject petitioner's invitation to abandon established principles of government contract interpretation.

B. A Government Has The Authority To Make Contract Obligations Concerning Regulation.

Petitioner's theories of when a government or one of its agencies has authority to make a binding contractual obligation are as contrary to precedent as its theory of how a government must express its contractual intent. Petitioner first asserts that not even a legislative body, much less a government agency, can make a contract concerning any "regulatory" issue. Pet. Br. at 38.

Initially, the contracts at issue in this case are financial obligation contracts, the performance of which does not limit (or even affect) sovereign regulatory authority. *See United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 24 (1977). Moreover, numerous decisions of this Court hold that, in fact, a sovereign can make contracts affecting the future exercise of its regulatory authority outside the areas of public health and public morals. Those decisions concerning the authority of the federal government to enter such binding contracts are discussed thoroughly in respondents' briefs. As *Perry v. United States* makes particularly clear, not only is the federal government authorized to make contracts that may affect future regulatory treatment, but the power to make such contracts is an essential attribute of sovereign authority. 294 U.S. 330, 353 (1935).

Contract Clause cases also contradict the government's theory that "regulatory" contracts cannot exist. To the contrary, the reserved powers doctrine is limited to the uniquely important areas of regulations "necessary to protect the public health, or the public morals." *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U.S. 650,

669 (1885); *see also id.* at 665-69 (citing other cases); *Grand Trunk Western Ry. Co. v. City of South Bend*, 227 U.S. 544, 554 (1913) (in government contract area, police power is limited to preventing activity that is "a nuisance in law"; application of doctrine cannot be based on government's reconsideration of "inconveniences" of contract that were foreseeable from the outset). Outside these areas, this Court has enforced a variety of state and municipal contracts that make promises, in return for substantial consideration, concerning future regulatory treatment. *See, e.g., Wood v. Lovett*, 313 U.S. 362 (1941) (challenges to validity of tax sales); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938) (tenure of public education teachers); *Appleby v. City of New York*, 271 U.S. 364, 380 (1926) (state can contract that specific land will be "free from subsequent regulatory control"); *St. Cloud Pub. Serv. Co. v. City of St. Cloud*, 265 U.S. 352, 355 (1924) (municipal contract can "suspend, during its life, the governmental power of fixing and regulating . . . rates"); *Russell v. Sebastian*, 233 U.S. 195 (1914) (utility regulation); *American Smelting & Refining Co. v. Colorado*, 204 U.S. 103 (1907) (conditions for foreign corporations to transact business); *Von Hoffman v. City of Quincy*, 71 U.S. (4 Wall.) 535 (1866) (taxation); *see also United States v. Bekins*, 304 U.S. 27, 51-52 (1938). In particular, the government cannot justify its financial interest in not paying breach-of-contract damages merely by using the term "police power." *See Wood v. Lovett*, 313 U.S. 362, 372 (1941) ("It begs the question to say that the State may not abdicate its police power"); *W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56, 60 (1935) ("Even when the public welfare is invoked as an excuse, these bounds [of honoring a government contract] must be respected"); *Missouri, Kansas & Texas Ry. Co. v. Oklahoma*, 271 U.S. 303, 310 (1926) (agreement under which city bears the cost of complying with subsequent regulation "does not infringe the police power").

The government's second "authority" argument is premised on the purported notion that under Contract Clause precedent a city's or agency's delegated authority to contract is somehow suspect.[4] Pet. Br. at 39-40. But this Court has held that when a state agency or a city has general statutory authority to contract that is "unrestricted" or comprehensive, then the agency's or city's contracts are binding. *City of Vicksburg v. Vicksburg Waterworks Co.*, 206 U.S. 496, 508 (1907). FSLIC had precisely such "unrestricted" and comprehensive authority "to make contracts," 12 U.S.C. § 1725(c)(3) (1989) (repealed 1989), as do a number of federal agencies in the education and social services area. *See, e.g.*, 20 U.S.C. § 1442 (1995) (Secretary of Education).

Moreover, it is absurd to suggest, as petitioner does, that the unrestricted statutory authority "to make contracts" is something less than the authority to make *binding* contracts, and that the latter requires that a government agency have extra express statutory authority for "enter[ing] into contracts limiting [the legislature's] future regulatory power." Pet. Br. at 39, 39-41. *Amici* are not aware of a single federal or state statute that contains such an extra proviso because such a requirement would plainly be redundant. A "contract" is defined as "a promise or a set of promises *for the breach of*

[4] We concur with respondents that the government's analogy between a federal agency's authority to contract and a state agency's authority is flawed. First, federal agencies do not need express statutory authority to enter contracts related to the exercise of their other delegated powers. *See Moses v. United States*, 166 U.S. 571, 585-87 (1897); *Jessup v. United States*, 106 U.S. 147, 152 (1882); *United States v. Tingey*, 30 U.S. (5 Pet.) 115, 127 (1831). Second, deference is owed by this Court to a federal *agency's* interpretation of its own statutory authority, *see, e.g., Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 844-45 (1986); by contrast, in Contract Clause cases, this Court gives limited deference to a state *court's* interpretation of an agency's or city's authority, *see, e.g., Appleby v. City of New York*, 271 U.S. 364, 380 (1926).

which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." Restatement (Second) of Contracts § 1 (1981) (emphasis added); Restatement of Contracts § 1 (1932) (same). The plain meaning of giving an agency authority to "contract" is that the agency's promises will be "recognize[d]" by "the law."

Indeed, the argument that petitioner advances here is no more than a reprise of the argument made by the government entity and rejected by this Court in *Von Hoffman v. City of Quincy*, 71 U.S. (4 Wall.) 535 (1866). That case concerned an Illinois statute that precluded the City of Quincy from levying taxes needed to pay the interest on certain previously issued railroad bonds. The City argued that because its prior statutory authorization to issue bonds did not expressly extend to binding the taxing power of a future state legislature, the City could not agree by contract to levy taxes sufficient to pay the bonds. *Id.* at 542-46 (argument for the City). Rejecting that argument, this Court held that, "where a State has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the [taxing] power thus given cannot be withdrawn until the contract is satisfied. The State and the corporation, in such cases, are equally bound." *Id.* at 554-55. *See County of Ralls v. Douglass*, 105 U.S. 728, 735 (1881) ("It must be considered as settled in this court, that when authority is granted by the legislative branch of the government to a municipality, or a subdivision of a State, to contract . . ., the power to levy taxes sufficient to meet, at maturity, the obligation to be incurred, is conclusively *implied*. . .") (emphasis added); *Murray v. City of Charleston*, 96 U.S. 432, 444-46 (1877) (until municipal contract has been performed, "*no act of State sovereignty* can work an exoneration from what has been promised," *id.* at 445 (emphasis added)).

The rule of *Von Hoffman* and these later cases is that the delegation of authority to make contracts inherently means that government contractual obligations undertaken pursuant to that authority will not be nullified by subsequent regulatory changes emanating either from the city *or* the state. A private party contracting with a municipality or state agency that has the authority to make contracts can thus rely on the binding character of those contracts. The private party need not look for additional assurances that the municipality or agency's authority permits it to make contractual obligations enforceable by damages actions in the event that subsequent legislation prevents the government's own performance of its contract. Such additional assurances would be superfluous.

As with petitioner's theory that unmistakability requires narrow formalism rather than sufficient evidence of intent, petitioner's theory of contractual authority could cast doubt on the value of many of the current contracts of *amici* and their members with state and local governments. Also, if adopted, this theory would pose a major obstacle to *amici's* ability to contract with governments in the future. The high uncertainty costs concerning when a government agency was adequately authorized to make contracts could force many businesses and institutions out of contracting with the government altogether, and force others to raise their prices as a form of insurance premium. The impact would be the worst for small entities which lack the lobbying resources to appeal to the legislature if an injustice is done such as the government's reneging on a deal after the private party has performed.

C. Subsequently Enacted "General" Legislation Will Not Excuse A Pre-Existing Contractual Obligation Of The Government.

The United States concludes by arguing that even if FSLIC entered into authorized contractual obligations, those obligations were excused by enactment of "public

and general" legislation (*i.e.*, FIRREA). Pet. Br. at 43. As respondents demonstrate, petitioner's last contention is plainly refuted by this Court's decisions concerning the effect of general statutes on federal contracts. *See Perry v. United States*, 294 U.S. 330, 353-54 (1935); *Lynch v. United States*, 292 U.S. 571, 579-80, 584-85 (1934). The same conclusion is compelled by this Court's Contract Clause decisions.

First, if this were a Contract Clause case, the Court would plainly construe the statute, if at all possible, to preserve the contractor's claim for compensatory damages, not to eliminate it indirectly or by implication. *See Hays v. Port of Seattle*, 251 U.S. 233, 237 (1920) (statute that ended government contractual project construed not to impair contractor's claim for damages for breach). Indeed, this Court has similarly construed federal statutes. *See United States v. Larionoff*, 431 U.S. 864, 879 (1977) (Court requires "clear expression of congressional intent" to bar contractual claim for compensatory damages).

Second, Contract Clause precedent squarely forecloses any suggestion that a government may impair its own contracts either through the device of "general" legislation or through the judiciary's using the statute as a basis for relieving the government of its contractual obligations. *See, e.g., Georgia Ry. & Power Co. v. Town of Decatur*, 262 U.S. 432, 439 (1923) ("While the statute does not refer to the contract . . ., the necessary result of the decision of the state courts is to give it that effect, and . . . substantially impair the obligation of the contract"); *Detroit United Ry. v. Michigan*, 242 U.S. 238, 247 (1916) (constitutional prohibition applies to the effects of laws that "contain no reference to existing contracts" because that protection "does not depend upon the form in which the legislative action is expressed, but rather upon its practical effect and operation as construed" by the courts); *Carondelet Canal & Navigation*

Co. v. Louisiana, 233 U.S. 362, 378 (1914) (impairment of government contracts prohibited "whether boldly declared in an explicit law or disguised in an ambiguous form").

III. GOVERNMENTS CANNOT BE EXCUSED FROM PAYING DAMAGES FOR BREACH OF THEIR OWN CONTRACTS BECAUSE OF FISCAL PRESSURES.

The implicit premise of the argument of the United States is that because resolving failed savings and loans has been costly for the federal deposit insurance fund, the government should be excused from FSLIC's contractual obligations. *See* Pet. Br. at 3-5, 21-22. This is a variation of an argument often made—and always rejected by this Court—in times of government fiscal stress.

The Constitution itself rejected this kind of argument in both the Contract Clause and in Section 1 of Article VI: "All Debts contracted *and* Engagements entered into, before the Adoption of this Constitution shall be as valid against the United States under this Constitution, as under the Confederation." U.S. Const. art. VI, § 1 (emphasis added). The Framers plainly understood that under the Constitution both state and federal contracts would be protected from abrogation. *See, e.g., The Federalist Papers*, No. 15, at 146 (Penguin 1987); Alexander Hamilton, 3 *Hamilton's Works* 518, 519. After the Civil War, this Court repeatedly rejected efforts at government contractual abrogation. *See* Benjamin F. Wright, *The Contract Clause of the Constitution* 93 (1938) (citing 12 state government contract decisions between 1865 and 1873). Similarly, during the Great Depression, a period of far greater government fiscal stress than now, this Court rejected on five separate occasions state *and* federal government efforts to abrogate their own contracts. *See Wood v. Lovett*, 313 U.S. 362 (1941); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938); *Perry v. United States*, 294 U.S. 330 (1935); *W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56 (1935); *Lynch v. United States*, 292 U.S. 571 (1934).

More recently, during the "stagflation" of the mid and late 1970s, the Court rejected pleas to release governments from their contractual obligations because of government fiscal pressures. *See United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 29-32 (1977); *see also Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412 n.14 (1983) ("When a state itself enters into a contract, it cannot simply walk away from its financial obligations. In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets"). Similarly, very recently this Court unanimously rejected the government's "more money" arguments, based on savings and loan failures, to expand federal common law or rewrite tort law generally. *O'Melveny & Myers v. Federal Deposit Ins. Co.*, 114 S. Ct. 2048, 2053-56 (1994).

Once again, this Court is called upon to perform a core function—holding the government to honoring its own contracts by paying compensatory damages for breach. This requirement to pay compensatory damages does not impede any government policy choice; it only requires payment to those who have contractually provided substantial consideration to the government. *See, e.g., United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 29-31 (1977). This requirement has been part of our constitutional system from the beginning of our nation. It has produced both *lower* contracting costs for state and federal governments, *see, e.g., United States v. Purcell Envelope Co.*, 249 U.S. 313, 318 (1919), and justice for those citizens who solemnly contract with their government. "Great nations, like great men, should keep their word." *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting).

CONCLUSION

For the reasons stated, and those stated by respondents, the judgment should be affirmed.

Respectfully submitted,

Of Counsel
SHELDON ELLIOT STEINBACH
AMERICAN COUNCIL ON EDUCATION
One Dupont Circle, Suite 835
Washington, D.C. 20036
(202) 939-9355

J. MARK WAXMAN
FOLEY LARDNER WEISSBURG & ARONSON
2049 Century Park East, 32nd Floor
Los Angeles, CA 90067-3271
(310) 277-2223

JOSEPH N. ONEK *
KENT R. MORRISON
ROBERT P. CHARROW
CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2595
(202) 624-2500
Attorneys for Amici Curiae

* Counsel of Record

BEST AVAILABLE COPY

QUESTION PRESENTED

Amici will address the following question:

Whether the government's three "defenses" to respondents' breach of contract claims, even if accepted by the Court, fail to defeat a claim based on the distinct theory of frustration of purpose.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

A. Interest of Trinity Ventures, Ltd. 1

B. Interest of Castle Harlan, Inc. 2

SUMMARY OF ARGUMENT 3

ARGUMENT 6

A. As the Only Two Courts to Address the Issue Have Held, an Award of Rescission and Restitution Under the Frustration of Purpose Doctrine Is Appropriate Where FIRREA Frustrated A Primary Purpose of the Parties' Agreement 7

B. The Three "Defenses" Asserted By the Government to Respondents' Breach of Contract Claims, Even If Accepted by the Court, Would Not Defeat A Claim Based on Frustration of Purpose 13

1. The "Unmistakability Doctrine" Does Not Bar Rescission and Restitution for Frustration of Purpose 13

2. Even If FHLBB and FSLIC Did Not Have Authority to Enter Into the Contracts at Issue, Rescission and Restitution Would Be a Proper Remedy 16

3. As the Government Has Expressly Conceded, the Sovereign Acts Doctrine Cannot Defeat a Frustration of Purpose Claim 19

CONCLUSION 21

TABLE OF AUTHORITIES

Cases **Page**

Aldrich v. *Chemical Nat'l Bank*, 176 U.S. 618 (1900) 17

Castle v. *United States*, No. 90-1291C (Ct. Fed. Cl. filed Sept. 25, 1990) 3,11

Central Transp. Co. v. *Pullman's Palace Car Co.*, 139 U.S. 24 (1891) 17

Chandler v. *Webster*, [1904] 1 K.B. 493 15

Citizens' Central Nat'l Bank v. *Appleton*, 216 U.S. 196 (1910) 17

Far West Fed. Bank, S.B. v. *Director, OTS*, 787 F. Supp. 952 (D. Or. 1992), *appeal docketed sub nom. Trinity Ventures, Ltd., et al.* v. *FDIC*, Nos. 92-35597, 92-36535 (9th Cir.) 1,2,11

Far West Fed. Bank, S.B. v. *Director, OTS*, 930 F.2d 883 (Fed. Cir. 1991) 1

Fibrosa Spoka Akcyjna v. *Fairbairn Lawson Combe Barbour, Ltd.*, [1943] A.C. 32 15

Gould, Inc. v. *United* States, 67 F.3d 925 (Fed. Cir. 1995)..... 18

Griffin v. *Brymer*, 19 T.L.R. 434 (K.B 1903) 15

Krell v. *Henry*, [1903] 2 K.B. 740 (C.A.) 15

Louisville & Nashville R.R. Co. v. *Crowe*, 160 S.W. 759 (Ky. 1913) 12

Marsh v. *Fulton County*, 77 U.S. (10 Wall.) 676 (1870) 16,17

New York Central and Hudson River R.R. Co. v. *Gray*, 239 U.S. 583 (1916) 12

Ocean Technology, Inc. v. *United States*, 19 Cl. Ct. 288 (1990) 18

Prestex, Inc. v. *United States*, 320 F.2d 367 (Ct. Cl. 1963) 18

Rankin v. *Emigh*, 218 U.S. 27 (1910) 17

RTC v. *FSLIC*, 25 F.3d 1493 (10th Cir. 1994) ... 7,10,12

Texas Co. v. *Hogarth Shipping Co.*, 256 U.S. 619 (1921) 14

United States v. *Amdahl Corp.*, 786 F.2d 387 (Fed. Cir. 1986) 18

United States v. *General Douglas MacArthur Senior Village, Inc.*, 508 F.2d 377 (2d Cir. 1974) .. 8,16

Urban Data Sys., Inc. v. *United States*, 699 F.2d 1147 (Fed. Cir. 1983) 18

Walker v. *Continental Life & Accident Co.*, 445 F.2d 1072 (9th Cir. 1971) 12

West Los Angeles Institute for Cancer Research v. *Mayer*, 366 F.2d 220 (9th Cir. 1966), *cert. denied*, 385 U.S. 1010 (1967) 7,12

Winton v. *Amos*, 255 U.S. 373 (1921) 12

Statutes

Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA"), No. 101-73, 103 Stat. 86 (1989) 2

Other Authorities

6 Arthur L. Corbin, *Corbin on Contracts* (1962)... *passim*

2 E. Allan Farnsworth, *Farnsworth on Contracts* (1990)..... 8

3 E. Allan Farnsworth, *Farnsworth on Contracts* (1990)..... 9

2 George E. Palmer, *The Law of Restitution* (1978)..... 8,9,15

RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981) 19

RESTATEMENT (SECOND) OF CONTRACTS § 262 (1981) 19

RESTATEMENT (SECOND) OF CONTRACTS § 265 cmt. a (1980) 8

RESTATEMENT (SECOND) OF CONTRACTS § 272(1) (1981) 12

12 Samuel Williston & Walter E. Jaeger, *A Treatise on the Law of Contracts* (3d ed. 1970)..... 8,9

BRIEF OF *AMICI CURIAE*
TRINITY VENTURES, LTD.
AND CASTLE HARLAN, INC.
IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE*[*]

A. Interest of Trinity Ventures, Ltd.

Trinity Ventures, Ltd. ("Trinity") is the lead plaintiff in the only other *Winstar*-related case presently pending before a federal appellate court. In that case, the district court has entered a $26.6 million judgment in plaintiffs' favor based on a legal theory -- frustration of purpose -- distinct in many important respects from the breach of contract claims presented here. *Far West Fed. Bank, S.B.* v. *Director, OTS*, 787 F. Supp. 952, 955-56 (D. Or. 1992), *appeal docketed sub nom., Trinity Ventures, Ltd., et al.* v. *FDIC*, Nos. 92-35597, 92-36535 (9th Cir.).

In 1987, Trinity and a number of other investors were "encouraged by the Federal Home Loan Bank Board ('FHLBB') and its deposit insurance arm the Federal Savings and Loan Insurance Corporation ('FSLIC')" to recapitalize Far West Federal Bank, S.B. ("Far West"), an "essentially insolvent" thrift in Portland, Oregon, with approximately $26.6 million cash. *Far West Fed. Bank, S.B.* v. *Director, OTS*, 930 F.2d 883, 885 (Fed. Cir. 1991). This investment was made in exchange for *explicit* promises from the government regarding the capital requirements to be

[*] Letters reflecting written consent of the parties to the filing of this brief have been filed with the Clerk of the Court.

applied to Far West for a specified period of time "notwithstanding any subsequent changes" in how the standard thrift capital requirements might be defined.

The express promises made to Far West's investors were abrogated by the enactment of the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA"), No. 101-73, 103 Stat. 86 (1989). Application of FIRREA's stringent new capital standards to Far West resulted in the government's seizure of Far West and its confiscation of plaintiffs' $26.6 million cash investment. After extensive litigation (including intervening decisions by the Federal Circuit and the Ninth Circuit), the district court held that the enactment and implementation of FIRREA frustrated the central purpose of the parties' contract and, accordingly, granted rescission of the contract and an award of restitution to the investors "in an amount equal to their cash investment in Far West" of $26.6 million. 787 F. Supp. at 960-63. A decision in *Trinity Ventures* has been deferred by the Ninth Circuit pending appellate review in *Winstar*.

B. Interest of Castle Harlan, Inc.

Much like the situation in *Trinity Ventures*, in December 1988 a group of private investors led by Castle Harlan, Inc. ("Castle Harlan") were induced by FHLBB and FSLIC to recapitalize Western Empire Savings and Loan Association ("Western Empire"), an insolvent thrift located in California, with approximately $15 million in cash. This investment was made in exchange for the government's promises, *inter alia*, that Western Empire would be subject for a period of at least five years to specific "modified capital requirements" rather than the standard capital requirements applicable to thrifts, and could hold certain percentages of its assets in specific types of investments. These promises, which were the result of extensive negotiations, are expressly set forth in a written agreement signed by the parties.

The enactment of FIRREA likewise abrogated the specific contractual promises made to the Western Empire investors, including the promise that Western Empire could operate under the modified capital requirements negotiated by the parties. The government instead applied the new FIRREA capital requirements to Western Empire, and because the thrift could not meet those requirements the government seized the thrift and placed it into receivership in February 1990. Thus, less than 14 months after it induced plaintiffs to invest $15 million in Western Empire, the government confiscated that $15 million cash investment to the government's own use.

The Western Empire investors have brought suit in the United States Court of Federal Claims, alleging breach of contract, frustration of purpose and Fifth Amendment takings claims. *Castle* v. *United States*, No. 90-1291C (Ct. Fed. Cl. filed Sept. 25, 1990). The *Castle* suit has been stayed pending this Court's decision in the present case.

SUMMARY OF ARGUMENT

1. The complaints in the cases before this Court, like the complaints filed by *amici*, allege three principal causes of action: (1) breach of contract, (2) frustration of purpose, and (3) violation of the takings and due process clauses of the Fifth Amendment. In the present case the courts below found for the plaintiffs on the breach of contract claim, without reaching the other two causes of action, and held that the plaintiffs are entitled to recover damages for that breach.

The government asserts three defenses to respondents' breach of contract claim: (1) the "unmistakability doctrine"; (2) the government agencies' supposed lack of authority to enter into the contracts involved here; and (3) the sovereign acts doctrine. For the reasons stated in respondents' briefs, those arguments should be rejected. Even if the Court were to conclude that one or more of the government's defenses barred recovery for breach of contract, however, those defenses would *not* defeat a claim based on frustration of purpose for the reasons discussed herein.[1] Should the Court rule in the government's favor on this appeal, therefore, its opinion should make clear that such a decision does not preclude a claim based on the frustration of purpose doctrine.

2. It is black-letter contract law that, where a principal purpose of a contract is substantially frustrated by a supervening event that the parties had assumed would not occur, a party is entitled to obtain rescission of that contract and restitution of any consideration paid to or benefits bestowed upon the other party. The only two courts that have addressed such "frustration of purpose" claims in *Winstar*-related cases have held that the enactment of FIRREA was a supervening event frustrating a central purpose of the parties' contracts, thus entitling the plaintiffs to rescission and restitution.

3. The so-called "unmistakability doctrine" is irrelevant to the frustration of purpose claims because, even accepting the United States' characterization of that doctrine, it only pertains to "the interpretation of promises made in a con-

---

[1] Nor would those defenses defeat a claim based on the Fifth Amendment, as explained in a separate *amicus* brief filed by AmBase Corporation and Carteret Bancorp.

tract." Pet. Br. at 11 (emphasis omitted). To recover for frustration of purpose, the party seeking relief need demonstrate only that a supervening event substantially frustrated a principal purpose of the contract, quite apart from whether any terms of the contract were violated. Consequently, it does not matter whether FSLIC and FHLBB *promised* in "unmistakable terms," or at all, that the thrifts would not be subject to any new legislation imposing regulatory capital requirements contrary to those in force at the time the parties' agreement was negotiated. What matters is only that the parties *assumed* at the time the contracts were made that no such legislation would be enacted.

Put slightly differently, it is not necessary for the government to have promised, in "unmistakable" or any other terms, to bear the risk of such subsequent legislation. The plaintiffs need only establish that the contract does not expressly allocate the risk of the supervening event's occurrence to either party, and hence the *absence* of language "expressly allocating" this risk to *plaintiffs* is enough to establish a right to recover for frustration of purpose. The unmistakability doctrine thus does not even come into play.

4. The government's argument that FSLIC and FHLBB acted without proper authority in entering into contracts with respondents (Pet. Br. at 36-43) also is irrelevant to a claim for rescission and restitution based on the frustration of purpose doctrine. Even were the government correct, it would follow as a matter of course that a plaintiff would be entitled to rescission and restitution. As this Court has recognized, it is a fundamental equitable principle that rescission and restitution are proper remedies for an *ultra vires* contract in which a party without proper authority obtains money or property of others.

5. Finally, as the government has *expressly* conceded, the sovereign acts doctrine likewise cannot defeat a frustra-

tion of purpose claim. A private party's duty to render performance is discharged, and hence the party cannot be liable for contract damages, when the enactment of a statute precludes performance. The government contends that the sovereign acts doctrine applies the same rule to the government under the circumstances of this case. Even if this were so -- which it is not -- it would not defeat a frustration of purpose claim. As the government recognizes, the situation where a party's performance is rendered impossible by subsequent legislation is a classic circumstance for granting rescission and restitution to the other side under the frustration of purpose doctrine.

ARGUMENT

The issue directly presented to this Court is a narrow one: whether any of three specific defenses asserted by the government defeat the breach of contract claims brought by respondents. Respondents' breach of contract claims, however, are only one of several theories of recovery alleged in their complaints. Respondents (as well as *amici* in their lawsuits) also allege claims for frustration of purpose, and for violation of the takings and due process clauses of the Fifth Amendment. These claims were not reached by the courts below.[2]

---

[2] The Federal Circuit's *en banc* majority opinion did not reach the frustration of purpose or Fifth Amendment claims because it concluded that respondents were entitled to recover for breach of contract. The two dissenting judges, while rejecting the breach of contract claims, left open the possibility of finding liability on a different theory. *See* Pet. App. at 47a ("In my view, the plaintiffs can assert only a claim for an alleged taking of their property by the legislation, a claim which remains to be litigated.") (Nies, J., dissenting); *id.* at 49a ("I believe that the sovereign acts doctrine is a barrier to the thrifts' recovery under the breach of contract theory.") (Lourie, J., dissenting). As noted *infra*, the government concedes that the sovereign acts doctrine is *not* a "barrier" to recovery under either a frustration of purpose or takings theory.

The purpose of this brief is to address the frustration of purpose doctrine, and in particular to explain why *none* of the three "defenses" asserted by the government with respect to respondents' breach of contract claims -- even if accepted by this Court -- would defeat a frustration of purpose claim. The government has conceded this with respect to its sovereign acts defense, and for the reasons discussed below the same conclusion must be reached with respect to the government's "unmistakability doctrine" defense as well as its defense that the agencies who entered into contracts with respondents allegedly lacked the authority to do so. Accordingly, in the event that the Court rules in the government's favor on the breach of contract claims, it should make clear that its decision does not preclude a claim based on frustration of purpose.

A. As the Only Two Courts to Address the Issue Have Held, An Award of Rescission and Restitution Under the Frustration of Purpose Doctrine Is Appropriate Where FIRREA Frustrated A Primary Purpose of the Parties' Agreement

Under the frustration of purpose doctrine, a party is entitled to obtain rescission of a contract, and restitution of any consideration and benefits rendered to the other party, in the event that a "primary purpose" of the contract "has been destroyed by a supervening event that the parties assumed would not occur." *RTC* v. *FSLIC*, 25 F.3d 1493, 1503 (10th Cir. 1994). *See also West Los Angeles Institute for Cancer Research* v. *Mayer*, 366 F.2d 220, 223 (9th Cir. 1966) (frustration of purpose doctrine applicable when

"through a supervening circumstance for which neither party is responsible, a thing, event or condition which was essential so that performance would yield to the promisor the result which the parties intended him to receive, fails"), *cert. denied,* 385 U.S. 1010 (1967); 6 Arthur L. Corbin, *Corbin on Contracts* § 1353, at 496 (1962); 2 George E. Palmer, *The Law of Restitution* § 7.1, at 101 (1978); 12 Samuel Williston & Walter E. Jaeger, *A Treatise on the Law of Contracts* § 1454, at 5 (3d ed. 1970).

According to the Restatement, rescission of a contract and an award of restitution are appropriate under the frustration of purpose doctrine when (1) the supervening event frustrates a "principal" purpose of the contract, meaning one that is "so completely the basis of the contract that, as both parties understood, without it the transaction would make little sense"; (2) the frustration is "substantial"; and (3) the "non-occurrence of the frustrating event" was "a basic assumption on which the contract was made." RESTATEMENT (SECOND) OF CONTRACTS § 265 cmt. a (1980). *See also* 6 Corbin, *supra*, § 1353-1361; 2 E. Allan Farnsworth, *Farnsworth on Contracts* § 9.7 (1990).

A claim for frustration of purpose is fundamentally different in nature from a claim for breach of contract. To recover for frustration of purpose it is not necessary to show that the other party breached any contractual obligations; rather, the focus of the inquiry is whether a principal purpose of the contract has been frustrated *regardless of fault by either party* due to an event that, in entering into the contract, the parties assumed would not occur. Further, a party seeking to recover for frustration of purpose need not establish that the other party agreed to bear the risk of such an event; it only must show that "the contract does not expressly allocate the risk of the [supervening] event's occurrence to either party." *United States* v. *General Douglas MacArthur Senior Village, Inc.*, 508 F.2d 377, 381 (2d Cir. 1974).

Consistent with the fact that neither side need be at fault for the frustration of purpose doctrine to apply, the monetary remedy available on a frustration of purpose claim is more limited than that available for breach of contract. In a breach of contract case, the plaintiff normally obtains "benefit-of-the-bargain" damages, measured by what the plaintiff would have received had the contract not been breached. *E.g.*, 3 Farnsworth, *Farnsworth on Contracts*, § 12.1, at 147-48 (1990); 12 Williston & Jaeger, *supra*, § 1454, at 2-3. In appropriate circumstances, a plaintiff may choose the alternative remedy of rescission and restitution. *E.g.*, 3 Farnsworth, *supra*, § 12.1, at 150-51; 12 Williston & Jaeger, *supra*, § 1454, at 3-4. With respect to a frustration of purpose claim, however, the only available remedies are rescission of the parties' contract, discharge of the parties' duties of further contractual performance, and an award of restitution to one or both parties. *E.g.*, 6 Corbin, *supra*, §§ 1353, 1361, at 496; 2 Palmer, *supra*, § 7.1.

Two courts have addressed the frustration of purpose doctrine in *Winstar*-related cases, and both concluded that the plaintiffs were entitled to prevail on a frustration of purpose claim and to obtain an award of rescission and restitution. In *RTC* v. *FSLIC*, the investor plaintiffs had made a $6 million cash investment in a troubled thrift based on the government's agreement that the thrift could include supervisory and regulatory goodwill in the calculation of its regulatory capital. FIRREA abrogated this agreement, and the investors brought suit to rescind the contract. The district court granted plaintiffs rescission and restitution in the amount of their $6 million investment, and the Tenth Circuit affirmed the award on frustration of purpose as well as breach of contract grounds. With respect to the frustration of purpose claim, the Tenth Circuit held that "the primary purpose of the . . . transaction with FSLIC and FHLBB was to acquire and operate profitably a savings and loan

association within the regulated thrift industry," and that "[a]pplication of FIRREA's capitalization requirements . . . made it impossible for the . . . [acquirers] to fulfill their contract duty to operate the thrift in compliance, thus totally frustrating their purpose" in entering into agreements to acquire the thrifts. 25 F.3d at 1503.

Similarly, in *Trinity Ventures* the district court entered summary judgment for the investor plaintiffs on a frustration of purpose claim. The facts of *Trinity Ventures* are compelling. In 1987, those investors -- who were sought out by the government, which was actively looking for private investors to recapitalize insolvent thrifts -- agreed to contribute $26.6 million in cash to Far West as part of a heavily negotiated agreement with federal regulators. That agreement provided, *inter alia*, that (a) Far West would be permitted to operate for ten years under a capital schedule providing for gradually more stringent capital requirements, and (b) in calculating Far West's regulatory capital for purposes of the agreed capital schedule, "the components of [Far West's] 'regulatory capital' will be as defined [under then-effective insurance regulations] *notwithstanding any subsequent changes in the definition of regulatory capital*." 787 F. Supp. at 955 (emphasis in original).

In *Trinity Ventures* the chief negotiator *for the government* acknowledged in sworn testimony that "[i]t was my clear understanding that the government was entering into a binding contract, and that the ability of the Investors and Far West to rely on the government's contractual promises . . . [was] essential to the Investors' completing the [transaction]." Similarly, the lawyer *representing the government* in the transaction testified that the purpose of the contractual provision stating that the negotiated capital schedule would remain in place "notwithstanding any subsequent changes in the definition of regulatory capital" was to assure the Far West investors "that as long as they met their [modified

capital] schedule, that they didn't have to worry about anything else, that they were protected." *Trinity Ventures*, *supra*, Supplemental Excerpt of Record at 396, 413. FIRREA abrogated this promise -- and the central purpose of the parties' agreement -- with the result that the government seized Far West and thus effected a naked transfer to the government of plaintiffs' $26.6 million cash investment (as well as obtaining the benefit of further improvement in Far West's condition that resulted from plaintiffs' efforts over several years).

The district court had no trouble granting plaintiffs summary judgment on their frustration of purpose claim, holding that "[t]he government, no less than plaintiffs, intended that the promises specified in the [parties' agreement] would be kept. The non-occurrence of an event which would prevent the government from honoring its obligations under the [parties' agreement] (e.g., the enactment of new banking laws inconsistent with the contract) was therefore a basic assumption of the parties in creating the contract." Because this assumption was substantially frustrated by FIRREA, the plaintiffs were entitled to rescission and restitution under the frustration of purpose doctrine. 952 F. Supp. at 960-61.[3]

Under well-established principles of contract law, a contract between private parties that has been frustrated or rendered impossible of performance by an Act of Congress

---

[3] The facts in *Castle* v. *U.S.* are similar, including the government's agreement to permit Western Empire to operate for a specified period of time according to modified capital standards negotiated between the parties. FIRREA's abrogation and frustration of the parties' agreement, and the resulting seizure of Western Empire, likewise effectively resulted in the government's confiscation of the $15 million in cash the *Castle* plaintiffs had contributed to Western Empire. *See Castle*, *supra*, Complaint ¶¶ 29-62.

may be rescinded and restitution awarded. *See, e.g., Winton* v. *Amos*, 255 U.S. 373, 393 (1921); *New York Central and Hudson River R.R. Co.* v. *Gray*, 239 U.S. 583, 587 (1916); *Louisville & Nashville R.R. Co.* v. *Crowe*, 160 S.W. 759 (Ky. 1913); 6 Corbin, *supra*, § 1368, at 519-520; RESTATEMENT (SECOND) OF CONTRACTS § 272(1) and cmt. b (1981); *cf. West Los Angeles Institute for Cancer Research*, 366 F.2d at 223 (rescission warranted where supervening Internal Revenue Service ruling resulted in a "commercial frustration" of a contract and the "supervening impossibility of [the contract's] performance"), *cert. denied*, 385 U.S. 1010 (1967); *Walker* v. *Continental Life & Accident Co.*, 445 F.2d 1073 (9th Cir. 1971) (rescission and restitution awarded where Supreme Court ruling resulted in "commercial frustration" of contract). When the United States is a party to a contract whose performance has been frustrated by a federal statute such as FIRREA, the result is all the more clear. *See RTC v. FSLIC*, 25 F.3d at 1503.

As the foregoing discussion indicates, the conclusions in *RTC* v. *FSLIC* and in *Trinity Ventures* that the plaintiffs are entitled to rescission and restitution are grounded on a straightfoward application of the frustration of purpose doctrine. In those *Winstar*-related cases where the plaintiffs can establish that FIRREA substantially frustrated a principal purpose of the plaintiffs' agreement with the government and that the "non-occurrence" of FIRREA was a basic assumption on which the contract was made, the frustration of purpose doctrine thus provides an alternative basis for the plaintiffs to recover.

B. The Three "Defenses" Asserted By the Government to Respondents' Breach of Contract Claims, Even If Accepted By the Court, Would Not Defeat a Claim Based on Frustration of Purpose

1. The "Unmistakability Doctrine" Does Not Bar Rescission and Restitution for Frustration of Purpose

The government asserts that respondents' breach of contract claims "depend on the proposition that the federal thrift regulators entered into contracts that committed the government to follow certain regulatory policies for 25 to 40 years into the future, and that Congress then violated those commitments by enacting [FIRREA]." Pet. Br. at 22. Relying on the so-called "unmistakability doctrine," the government states that "the documents relied upon by respondents to reach that unusual result should not be construed to contain such contractual commitments unless agreements to that effect were expressed with unmistakable clarity." *Id.* The government then goes on to conclude that "the contracts at issue in this case did not purport to make any promises by the government concerning whether supervisory goodwill would continue to be treated as regulatory capital in the future." *Id.* at 36.

As respondents' briefs explain, the government's "unmistakability doctrine" defense rests on erroneous interpretations of both the parties' contracts and the unmistakability doctrine itself. Even were the Court to accept the government's arguments, however, and conclude that respondents' contracts did not "unmistakably" establish the existence of government promises regarding the regulatory

capital treatment of supervisory goodwill, this would not affect the merits of a frustration of purpose claim.[4]

According to the government, the unmistakability doctrine "governs the interpretation of the promises made in a contract." *Id.* at 11 (emphasis omitted). Application of the frustration of purpose doctrine, however, does not depend on the interpretation of the terms of a contract. As noted, to prevail on a frustration of purpose claim a party need not prove that the other party made any contractual promise that was breached. Rather, the party seeking relief simply must demonstrate that a supervening event substantially frustrated a principal purpose of the contract, quite apart from whether any terms of the contract were violated.

This Court has long recognized that relief may be granted under the frustration of purpose doctrine where the terms of the contract do not explicitly address the effect of the supervening event. As the Court observed,

> It long has been settled in the English courts and in those of this country, federal and state, that where parties enter into a contract on the assumption that some particular thing essential to its performance will continue to exist and be available for the purpose and neither agrees to be responsible for its continued existence and availability, the contract must be regarded as subject to an *implied* condition that, if before the time for performance and without the default of either party the particular thing ceases to exist or be

---

[4] It also would not dispose of *amici*'s breach of contract claims. As briefly discussed above, *amici* had express language in their contracts reflecting the government's promises in "unmistakable" terms, even under the government's version of the unmistakability doctrine.

> available for the purpose, the contract shall be dissolved and the parties excused from performing it.

Texas Co. v. *Hogarth Shipping Co.*, 256 U.S. 619, 629-30 (1921) (emphasis added). Thus, the frustration of purpose remedy is based upon an implied-in-fact, rather than explicit, understanding of the parties that the contract will be rescinded if a supervening event frustrates its performance.[5]

Consequently, it does not matter whether FSLIC and FHLBB *promised* in "unmistakable terms," or at all, that

---

[5] Textbook examples of the frustration of purpose doctrine are the turn-of-the-century English cases involving contracts for the rent of rooms to view King Edward VIII's coronation procession. After the coronation was postponed indefinitely because of the King's operation for appendicitis, courts ordered rescission of the contracts. Notwithstanding that the owners of the rooms had made no contractual promise to the renters that the coronation procession would occur and there was no breach of the contracts by the owners, courts held that the renters who had not paid were discharged of their obligation to pay for the rooms because "the coronation procession was the foundation" of the contracts and "the object of the contract[s]" was "frustrated by the non-happening of the coronation and its procession on the days proclaimed." *Krell* v. *Henry*, [1903] 2 K.B. 740, 751, 754 (C.A.); *see also Chandler* v. *Webster*, [1904] 1 K.B. 493; *Griffin* v. *Brymer*, 19 T.L.R. 434 (K.B 1903). Although some of these so-called "coronation cases" denied restitution of moneys already paid under the rental contracts, the House of Lords overruled those decisions thirty-eight years later when it "allowed recovery of money paid in consideration of the purchase of machinery for delivery to Poland which became impossible because of World War II." 2 Palmer, *supra*, § 7.1, at 100 (citing *Fibrosa Spoka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ltd.*, [1943] A.C. 32). In the United States, "most courts have rejected the early English view [which denied restitution] and [have] granted restitution over the whole range of cases in which impossibility or any related doctrine operates to discharge the contract obligations." *Id.*, § 7.1, at 101.

the thrifts would not be subject to any new legislation imposing regulatory capital requirements contrary to those in force at the time the parties' agreement was negotiated. What matters is only that the parties *assumed* at the time the contracts were made that no such legislation would be enacted. Put slightly differently, it is not necessary for the government to have promised, in "unmistakable" or any other terms, to bear the risk of such subsequent legislation. The plaintiff need only establish that "the contract does not expressly allocate the risk of the [supervening] event's occurrence to either party." *General Douglas MacArthur Senior Village*, 508 F.2d at 381. Hence, the *absence* of language "expressly allocating" this risk to *plaintiffs* is enough to establish a right to recover under the frustration of purpose doctrine. The unmistakability doctrine does not even come into play.

2. Even If FHLBB and FSLIC Did Not Have Authority to Enter Into the Contracts at Issue, Rescission and Restitution Would Be a Proper Remedy

The government also argues that respondents must be denied relief under their breach of contract claim because FSLIC and FHLBB lacked the statutory authority to enter into the contracts that the courts below found to exist between respondents and the government. *See* Pet. Br. at 36-43. *Amici* submit that those agencies had more than ample authority to enter into such contracts. But even if the agencies had acted without such authority, respondents would still be entitled to rescission and restitution under the precedents of this Court.

This Court has long recognized that rescission and restitution are warranted when a party to a contract -- whether it be a government agent or a private entity -- has acted in an *ultra vires* fashion in entering into the contract.

In *Marsh* v. *Fulton County*, 77 U.S. (10 Wall.) 676 (1870), the clerk of a state county court had sold bonds on behalf of the county even though the clerk "possessed no general authority to bind the county." *Id.* at 681. Concluding that the county was obligated to effect restitution of all moneys received from the purchasers of the bonds, this Court observed that "[t]he obligation to do justice rests upon all persons, natural and artificial; and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation." *Id.* at 684.

Similarly, in *Citizens' Central Nat'l Bank* v. *Appleton*, 216 U.S. 196 (1910), a national bank obtained money under a guaranty contract where the guarantee given by the bank "was beyond the power of the . . . bank, under the national banking statutes." The lower court entered judgment ordering restitution and this Court affirmed, holding that the award of restitution "was consistent with sound legal principles and was intrinsically right." 216 U.S. at 205. *See also Rankin* v. *Emigh*, 218 U.S. 27, 35 (1910) ("if one obtains the money or property of others without authority, the law, independently of express contract, will compel restitution or compensation"); *Aldrich* v. *Chemical Nat'l Bank*, 176 U.S. 618, 629-35 (1900) (discussing numerous cases awarding restitution as remedy for an *ultra vires* contract); *Central Transp. Co.* v. *Pullman's Palace Car Co.*, 139 U.S. 24, 60 (1891) ("A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it.").

This Court's approach has been followed by the lower courts, which have granted restitution when a government agency has without proper authority entered into a contract with a private contractor. In these circumstances, "[w]here a benefit has been conferred by the contractor on the government in the form of goods or services, which it accepted, a contractor may recover at least on a *quantum valebant* or *quantum meruit* basis for the value of the conforming goods or services received by the government prior to the rescission of the contract for invalidity." *United States* v. *Amdahl Corp.*, 786 F.2d 387, 393 (Fed. Cir. 1986) (footnote omitted). "Even though a contract be unenforceable against the Government, because not properly advertised, not authorized, or for some other reason, it is only fair and just that the Government pay for goods delivered or services rendered and accepted under it." *Prestex, Inc.* v. *United States*, 320 F.2d 367, 373 (Ct. Cl. 1963); *see also Gould, Inc.* v. *United States*, 67 F.3d 925, 929 (Fed. Cir. 1995) ("a contractor can be compensated under an implied-in-fact contract when the contractor confers a benefit to the government in the course of performing a government contract that is subsequently declared invalid); *Urban Data Sys., Inc.* v. *United States*, 699 F.2d 1147, 1154 (Fed. Cir. 1983); *Ocean Technology, Inc.* v. *United States*, 19 Cl. Ct. 288, 293 (1990) (where government contract was invalid, court found that it "would be manifestly unfair, at this late date, for [the government agency] to retain the benefits [of the contract] and the time value of the amount due plaintiff while renouncing its contractual obligations").

If it were true that FHLBB and FSLIC lacked authority to enter into contracts regarding the capital treatment of supervisory goodwill (or contracts otherwise addressing the capital treatment to be accorded particular thrifts), this would not defeat a frustration of purpose claim. To the contrary, because rescission and restitution are accepted remedies when the other party's execution of the contract

was *ultra vires*, it would be clear that the plaintiff is entitled to recover for frustration of purpose.

3. As the Government Has Expressly Conceded, the Sovereign Acts Doctrine Cannot Defeat A Frustration of Purpose Claim

Finally, as the government has *expressly* conceded, its third defense to respondents' breach of contract claims -- the sovereign acts doctrine -- cannot defeat a frustration of purpose claim.

"Under ordinary principles of contract law, a party's duty to render performance is discharged when an intervening action by the sovereign, such as enactment of a statute, precludes performance." Pet. Br. at 43-44, *citing* 6 Corbin, *supra*, § 1343, at 417 (1962); Restatement (Second) of Contracts §§ 261, 262 (1981). The government contends that the sovereign acts doctrine "applies the same rule to the government as contractor," subject to the qualification that "the sovereign act relied upon to excuse performance be a 'public and general' one." Thus, according to the government, "the United States would not be liable *for contract damages* if the governmental act that caused the breach of [respondents] rights was 'public and general.'" *Id.* at 44 (emphasis added).

The sovereign acts doctrine does not apply to the case before this Court for the reasons set forth by respondents. Even if it were applicable, however, and barred a claim for breach of contract, it would not defeat a frustration of purpose claim. As discussed above, a party whose performance is made impossible by subsequent legislation, and is therefore excused from performance and from liability for benefit-of-the-bargain contract damages, must nonetheless pay restitution of whatever consideration and other benefits it has already received under the contract. Indeed, as

noted, the situation where a party's performance is rendered impossible by subsequent legislation is a classic circumstance for granting rescission and restitution to the other side under the frustration of purpose doctrine.

The government has conceded this point. In its Reply Brief in Support of Petition for a Writ of Certiorari, the government states that Glendale's opposition brief "correctly argues that our sovereign acts defense 'does not defeat [its] claims for a constitutional taking or for frustration of purpose, mistake or other quasi-contractual relief.'" *Id.* at 11 n.6. The government also implicitly conceded this point in *Trinity Ventures* and *RTC* v. *FDIC*, where it did not raise the sovereign acts doctrine as a defense to the plaintiffs' frustration of purpose claims. Thus, the government's final defense to respondents' breach of contract claims, even if accepted by this Court, would not bar a claim for frustration of purpose.

CONCLUSION

The judgment of the Federal Circuit should be affirmed. In the event, however, that the judgment is reversed, this Court should make clear that its decision does not preclude a claim based on frustration of purpose.

Respectfully submitted,

*JOHN C. MILLIAN
JOHN K. BUSH
GIBSON, DUNN & CRUTCHER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

WESLEY G. HOWELL, JR.
GIBSON, DUNN & CRUTCHER
200 Park Avenue
New York, New York 10166
(212) 351-4000

**Counsel of Record*

Attorneys for Amici Curiae

March 29, 1996

BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE*..... 1

STATEMENT OF THE CASE..... 3

SUMMARY OF ARGUMENT 7

ARGUMENT 9

I. FEDERAL THRIFT REGULATORS HAD BROAD STATUTORY AUTHORITY TO ENTER INTO BINDING CONTRACTS REGARDING THE USE OF SUPERVISORY GOODWILL TO CALCULATE REGULATORY CAPITAL 11

II. THE CONTRACTS "UNMISTAKABLY" GIVE RESPONDENTS VESTED RIGHTS, THE ABROGATION OF WHICH ENTITLES THEM TO RECOVER DAMAGES..... 17

CONCLUSION 26

TABLE OF AUTHORITIES

Cases **Page**

American Fed. of Gov't Employees, Local 2017 v. *Brown*, 680 F.2d 722 (11th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983) 11

Appleby v. *Delaney*, 271 U.S. 403 (1926) 25

Bowen v. *Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) 15

Bowen v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986) 11,18

Carteret Sav. Bank, F.A. v. *Office of Thrift Supervision*, 963 F.2d 567 (3d Cir. 1992) 15,16

Chevron, U.S.A.. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 15

D & L Construction Co. & Assocs. v. *United States*, 402 F.2d 990 (Ct. Cl. 1968) 19

Fourco Glass Co. v. *Transmirra Products Corp.*, 353 U.S. 222 (1957) 21

Gerhart F. Meyne Co. v. *United States*, 76 F. Supp. 811 (Ct. Cl. 1948) 19

Guaranty Fin. Servs., Inc. v. *Ryan*, 928 F.2d 994 (11th Cir. 1991) 23

Hills Materials Co. v. *Rice*, 982 F.2d 514 (Fed. Cir. 1992) 21

Horowitz v. *United States*, 267 U.S. 458 (1925) 20

Hughes Communications Galaxy, Inc. v. *United States*, 998 F.2d 953 (Fed. Cir. 1993) 19

Landgraf v. *USI Film Prods.*, 114 S. Ct. 1483 (1994) 10

Lawrence v. *Chater*, No. 94-9323 (U.S. Jan. 8, 1996) 15

Local 2855, AFGE (AFL-CIO) v. *United States*, 602 F.2d 574 (3d Cir. 1979) 11

Lorillard, Inc. v. *Pons*, 434 U.S. 575 (1978) 17

Lynch v. *United States*, 292 U.S. 571 (1934) 11

Morales v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992) 21

Olympic Fed. Sav. & Loan Ass'n v. *Director, OTS*, 732 F. Supp. 1183 (D.D.C. 1990) 4

Perry v. *United States*, 294 U.S. 330 (1935) 11

Prestex Inc. v. *United States*, 320 F.2d 367 (Ct. Cl. 1963) 26

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) 17

Security Fed. Sav. & Loan Ass'n of Albuquerque v. *FSLIC*, 796 F. Supp. 1435 (D.N.M. 1991), *aff'd sub. nom Resolution Trust Corp. v. FSLIC*, 25 F.3d 1493 (10th Cir. 1994) 19,20

Wah Chang Corp. v. *United States*, 282 F.2d 728 (Ct. Cl. 1960) 19

Statutes

Competitive Equality Banking Act of 1987 ("CEBA"), Pub. L. No. 100-86, 101 Stat. 552 (1987) 16

CEBA § 307,12 U.S.C. § 1730h(b) (1988) (repealed) 16

CEBA § 307,12 U.S.C. § 1730h(d) (1988) (repealed) 17

Financial Institutions, Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 83 (1989) 3

7 U.S.C. § 608(2) 12

12 U.S.C. § 1725(a) (1988) (repealed) 12

12 U.S.C. § 1725(a) (1988) (repealed) 12

12 U.S.C. § l725(c)(3) (1988) (repealed) 12

12 U.S.C. § 1729(f) (1988) (repealed) 14

12 U.S.C. § 1729(f)(2)(A) (1988) (repealed) 12

12 U.S.C. § 1730(t) (1988) (repealed) 12

18 U.S.C. § 3621(b) 12

25 U.S.C. § 450f 12

Legislative History

H.R. Rep. No. 54, 101st Cong., 1st Sess., pt. 1 at 498 (remarks of Reps. Annunzio, Kanjorski and Flake), *reprinted in* 1989 U.S.C.C.A.N. 87 5

Housing and Urban-Rural Recovery Act of 1982: Hearings Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs, 97th Cong., 2d Sess. 1502 (1982) (Statement of Richard T. Pratt) 5

S. Rep. No. 19, 100th Cong., 1st Sess., at 20, *reprinted in* 1987 U.S.C.C.A.N. 489 17

Regulation

52 Fed. Reg. 39065 (Oct. 20, 1987) 14

Other Authorities

Accounting Principles Board Opinions 16 (Aug. 1970) 2

August 27, 1990 Letter From Milton J. Socolar, Acting Comptroller General of the United States to Senator Terry Stanford, Committee on Banking, Housing and Urban Affairs, and enclosed Memorandum (GAO Doc. No. B-240860) 13

Federal Home Loan Bank Board 1981 Annual Report 4

Federal Home Loan Bank Board 1984 Annual Report 4

1 Ralph C. Nash, Jr. & John Cibinic, Jr., *Federal Procurement Law* (3d ed. 1977) 12,14

Reply Brief for the Appellants, *Carteret Sav. Bank, F.A.* v. *Office of Thrift Supervision*, 963 F.2d 567 (3d Cir. 1992) 16

Troubled Financial Institutions: Solutions to the Thrift Industry Problem (GAO/GGD-89-47, Feb. 21, 1989) 4

16 U.S. Op. Off. Legal Counsel 75 (1992) 14

BRIEF OF *AMICUS CURIAE* DOLLAR BANK, F.S.B. IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE**

Dollar Bank, F.S.B. ("Dollar") is a federally-chartered and federally-insured mutual savings bank, headquartered in Pittsburgh, Pennsylvania. Originally chartered in 1855 by the Commonwealth of Pennsylvania, Dollar converted to a federal charter in 1984. Through a network of forty-six branch offices, Dollar currently serves a deposit base in excess of two billion dollars.

Dollar agreed to acquire and operate a financially troubled thrift at the solicitation and with the active encouragement of the federal agencies then charged with regulating the thrift industry. In 1984, Dollar entered into an Assistance Agreement with the Federal Savings and Loan Insurance Corporation ("FSLIC"), which incorporated by reference a contemporaneous Resolution of the Federal Home Loan Bank Board ("FHLBB") approving Dollar's acquisition of Continental Federal Savings and Loan Association ("Continental"), a failing FSLIC-insured mutual savings and loan association. At the time of the acquisition, Continental's liabilities exceed its assets by approximately $230 million. The Assistance Agreement and Resolution, which together constitute the entire understanding between the parties, contain several

---

* Letters reflecting written consent of the parties to the filing of this brief have been filed with the Clerk of the Court.

bargained-for commitments, including the FSLIC's and the FHLBB's promise that Dollar would have the right to amortize the value of the "supervisory goodwill"[1] resulting from the acquisition over a stipulated period on a straight-line basis, and to include the full amount of the unamortized supervisory goodwill in the calculation of regulatory capital for *all* purposes. The "Accounting Principles" section of the Assistance Agreement, which memorializes that understanding, provides that Dollar may make use of supervisory goodwill in the manner prescribed by the incorporated Resolution even if later changes in FHLBB regulations totally proscribe or in any way limit a thrift's ability to use supervisory goodwill for regulatory capital purposes. This same provision appears in the contracts of various thrifts, such as, for example, in the Statesman contract.

Dollar has fully performed its contractual obligations, and the FHLBB and the FSLIC -- as well as the Office of Thrift Supervision ("OTS") and the Federal Deposit Insurance Corporation ("FDIC"), as their statutory successors in interest -- have received the full benefit of the contractual bargain, including avoiding the considerable

---

[1]For decades under generally accepted accounting principles ("GAAP") goodwill -- the difference between the aggregate value of the individual assets of the entity purchased and the price the buyer paid -- has been recognized in purchase method accounting as a separate asset, *see* Accounting Principles Board Opinions 16 (Aug. 1970), and so was and is included in GAAP capital. The goodwill so produced that can be included in capital is reduced each year pursuant to a multi-year amortization schedule. Supervisory goodwill is a recent term of art referring to goodwill, both GAAP and the sometimes more generous "regulatory" type, arising from acquisitions of failing thrifts classified as "supervisory" cases.

expense of liquidating Continental and paying off its insured depositors.

Nevertheless, the OTS and the FDIC have refused to honor the contractual promises made to Dollar regarding the use of supervisory goodwill. As in the cases before the Court, the current federal thrift regulators have taken the position in their dealings with Dollar that any contractual promises regarding the accounting for regulatory capital have been abrogated and superseded by the regulatory standards mandated by the Financial Institutions, Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 83 (1989). While Dollar has satisfied all of FIRREA's capital requirements without including supervisory goodwill as permitted by its Assistance Agreement, it has accomplished that only at considerable sacrifice to its asset base.

Dollar, like respondents, believes that it is entitled to damages as a result of the government's failure to perform its contractual obligations. Accordingly, on June 27, 1995, Dollar brought suit in the United States Court of Federal Claims, alleging breach-of-contract and Fifth Amendment Takings Clause claims against the United States. Dollar's case has been stayed pending decision by this Court in these cases. As a result, Dollar's right to obtain the relief in its case undoubtedly will be directly affected by this Court's disposition of the present cases.

STATEMENT OF THE CASE

The savings and loan crisis of the 1980s and the reaction of the federal thrift regulators is by now a familiar tale. The thrift industry sustained billions of dollars in operating losses during the 1980s because of a substantial "negative spread" between the costs of funds and the return

on the thrifts' low, fixed-rate mortgage portfolios.[2] As the number of failing thrifts increased, the FSLIC deposit insurance fund, in turn, was being rapidly depleted.[3] The federal government was faced with either liquidating failing thrifts and paying off depositors, or supporting supervisory mergers and/or acquisitions by healthy thrifts with substantial cash contributions. Either alternative carried the serious prospect of bankrupting the FSLIC deposit insurance fund. *See Olympic Fed. Sav. & Loan Ass'n* v. *Director, OTS*, 732 F. Supp. 1183, 1185 (D.D.C. 1990).

As a way out of this dilemma, the FHLBB and the FSLIC mounted an aggressive program to induce healthy financial institutions or investors, such as Dollar, to acquire failing thrifts. To avoid depleting the FSLIC insurance fund, the federal thrift regulators began to negotiate and arrange supervisory mergers and acquisitions that included non-cash assistance, including, in particular, rights to the use of supervisory goodwill as a depreciating asset in calculating regulatory capital. *Id.*; *see also* Federal Home

---

[2]*See, e.g.*, Federal Home Loan Bank Board 1984 Annual Report at 6 (1985) ("During both the last half of 1981 and the first half of 1982, more than 80% of all FSLIC-insured associations lost money."); *Troubled Financial Institutions: Solutions to the Thrift Industry Problem* (GAO/GGD-89-47, Feb. 21, 1989) at 107 (the number of FSLIC-insured institutions reporting negative GAAP net worth rose from twenty-one in June 1981 to 500 in March 1988); *id.* at 110 (thrift industry net losses in 1987 and 1988 were $6.8 billion and $13 billion, respectively).

[3]*See, e.g., Troubled Financial Institutions, supra* note 2, at 108 (FSLIC's total reserves declined from $6.46 billion in 1980 to $4.55 billion in 1985, when the FHLBB estimated $15.8 billion was needed to close all GAAP-insolvent institutions).

Loan Bank Board 1981 Annual Report. In this regard, former FHLBB Chairman Richard T. Pratt explained that:

> The Bank Board was caught between a rock and a hard place. . . . While it did not have sufficient resources to close all insolvent institutions, at the same time, it had to consolidate the industry, move weaker institutions into stronger hands, and do everything possible to minimize losses during the transition period. Goodwill was an indispensable tool in performing this task. . . .

Pet. App. 7a (quoting Mr. Pratt).

Use of supervisory goodwill significantly benefited the government by allowing "the loss to the [FSLIC] insurance fund [to be] shifted to the acquiring institutions." H.R. Rep. No. 54, 101st Cong., 1st Sess., pt. 1 at 498 (remarks of Reps. Annunzio, Kanjorski and Flake), *reprinted in* 1989 U.S.C.C.A.N. 87, 293.[4] Indeed, without supervisory goodwill, many transactions would have been irresponsible -- if not, impossible -- because the capital deficit of the troubled thrift would have put the acquiring institution hopelessly out of compliance with then-applicable regulatory standards. *See, e.g.*, Pet. App. 22a.

Because supervisory goodwill was often vital to the financial viability of the transaction over the long-term, and

---

[4]*See also Housing and Urban-Rural Recovery Act of 1982: Hearings Before the Subcomm. on Housing and Community Development of the House Comm. on Banking. Finance and Urban Affairs*, 97th Cong., 2d Sess. 1502 (1982) (Statement of Richard T. Pratt) (supervisory goodwill contracts "conserv[ed] the FSLIC's insurance fund" by "spread[ing] as much of the industry's . . . trouble spots" as possible throughout healthy thrifts).

because acquirors were undoubtedly concerned about the possibility of subsequent regulatory changes that could undermine the economic basis of the transaction, many acquirors, like Dollar, insisted upon, bargained for, and obtained from the federal thrift regulators unqualified contractual commitments regarding the use to which they could put supervisory goodwill.

After the enactment of FIRREA, however, the OTS and the FDIC dishonored the contractual commitments made by their statutory predecessors, claiming that FIRREA abrogated all prior agreements that were inconsistent with the statute's new capital standards. Many of the thrifts aggrieved by the federal government's repudiation of its supervisory goodwill commitments sued, seeking either to hold the government to its binding promises, or, as is true in the instant cases, for damages or other make-whole relief.

The cases before the Court originated in the United States Court of Federal Claims, which held that respondents had contracts with the United States that were breached as a result of the federal thrift regulators' application of the FIRREA regulatory capital standards to respondents' thrifts. The trial court certified its liability determination for interlocutory appeal. A divided panel of the United States Court of Appeals for the Federal Circuit reversed the trial court. Upon respondents' petitions, the en banc Federal Circuit vacated the panel's decision and accepted the cases for review by the entire Court. After renewed briefing and reargument, the en banc Court affirmed the trial court's liability ruling.

SUMMARY OF ARGUMENT

The United States challenges the en banc decision of the Federal Circuit on three broad grounds. To begin with, the government contends that because the contracts at issue purport to restrict its authority to regulate, the court below failed to apply the so-called "unmistakability doctrine," to determine whether the contracts "surrendered" that authority in "unmistakable" terms, which it also maintains none of respondents' contracts do. Next, the United States asserts that even if these contracts unmistakably set forth the supervisory goodwill promises that respondents claim were made, the federal thrift regulators lacked authority to bind future Congresses and, thus, any commitment that the rules regarding calculating regulatory capital would not be changed was "*ultra vires* and invalid." Last, if all else fails, and the supervisory goodwill promises were, in fact, set out in unmistakable terms and the thrift regulators had the statutory authority to make those promises, the United States maintains that it is excused by the sovereign acts doctrine from paying contract damages.

In other words, the United States' position is effectively that the thrift regulators never made such promises; if they made those promises, they could not have meant what they said; and even if the thrift regulators made those promises and meant what they said, none of that counts. The predictable upshot of this paralogism is that the government not only is free to walk away from its commitments without compensating respondents for the losses sustained, but it can also retain the full benefits derived from having induced respondents and many others, like Dollar, to "bailout" the FSLIC insurance fund.

Dollar believes that the government's position on all three fronts is not well taken. In particular, Dollar agrees

with the Federal Circuit that the "unmistakability doctrine" is inapplicable in these circumstances, and that the sovereign acts doctrine does not bar respondents from recovering breach of contract damages due to the government's failure to honor its supervisory goodwill agreements. For the most part, Dollar will leave those issues to respondents. This amicus brief will, instead, focus on: (1) whether the FHLBB and the FSLIC had statutory authority to enter into contracts vesting in acquiring thrifts rights regarding the use of supervisory goodwill, and (2) whether the agreements at issue here did, in fact, establish such vested rights, the abrogation of which allows respondents to recover damages or other appropriate relief. The answer to both questions is a resounding yes.

There is little question but that the enabling statutes of the FHLBB and the FSLIC gave those agencies the authority to enter into binding contacts regarding the use of supervisory goodwill. The thrift agencies acted on that statutory authority to enter into contracts with respondents and other acquiring thrifts like Dollar. Congress plainly knew and approved the exercise of that authority.

Further, the language of the contracts at issue in this case (including the Statesman Assistance Agreement, which is very similar to Dollar's contract) establishes that respondents, like Dollar, were "unmistakably" given vested contract rights that the government is not free to override without any cost. Contrary to what the United States argues, the contractual language expressly states that its provisions control in the case of subsequent regulatory change, leaving unassailable the conclusion that it was not the acquiring thrifts but the government that assumed the risk of a subsequent regulatory change.

Try as it might, the United States is unable to articulate any convincing reason why thrifts would agree to relieve

the FSLIC insurance fund of substantial liability without also obtaining a binding reciprocal promise from the federal thrift regulators, creating a vested interest in using supervisory goodwill in the manner prescribed in the agreement. While there undeniably were potential benefits to the acquiring thrifts, none of those benefits could reasonably be achieved if the acquiring thrifts were deprived of the economic basis of the bargain -- the use of supervisory goodwill in calculating regulatory capital for the full prescribed period. Nor has the government effectively explained why it would be fair or just to construe the contracts at issue to deny respondents relief and permit the government both to retain the benefit of the bargain it struck and to be excused from meeting its unambiguous reciprocal obligations.

ARGUMENT

The music accompanying the words of each of the government's various arguments sounds the same false note: that in order to affirm the decision below, the Court must agree that the contracts at issue relieved respondents of the burden of complying with the law. According to the United States, the Federal Circuit in these cases held that "the contracts either committed Congress not to enact new legislation requiring a different treatment of respondents' capital or granted respondents a prospective immunity from any such legislative change." Pet. Br. at 36. Having so characterized the contracts at issue, the United States easily moves to the conclusion that such contracts are invalid because no federal agency may "enter into an agreement that binds future Congresses not to change regulatory schemes or that immunizes private parties from the effects of such changes." *Id.*

As it has throughout this litigation, the United States has simply mischaracterize the relevant issue. The question is

not whether, as the United States misphrases it, the federal thrift regulators could bind Congress or immunize the acquiring thrifts from the effects of subsequent legislation. Since the ability of Congress to legislate cannot be constrained except by some constitutional limitation, no Congress could authorize federal agencies to enter into contracts that limited the ability of a future Congress to enact legislation, or that immunized the parties from the prospective effect of such legislation.[5] That is a strawman that the government first builds and then knocks down because confronting the real issue in the case does not produce favorable answers.

No one claims that the contracts in dispute had the effect the government describes. Rather, the claim is that in return for assuming the losses of the acquired thrifts, thereby relieving the FSLIC fund of that responsibility, the federal thrift regulators made them specific, unqualified promises regarding the use of supervisory goodwill. To make that promised use of supervisory goodwill meaningful, the thrift regulators agreed that the government would be liable for breach of contract if it failed to honor those promises for whatever reason, including subsequent legislation. In other words, the government assumed the risk that subsequent legislation would render impossible performance of its supervisory goodwill commitments.

Consequently, the core issues in these cases are (1) whether the federal thrift regulators had statutory authority

---

[5] Such contracts may, however, create vested rights that Congress could not retroactively abrogate on due process grounds, *see Landgraf* v. *USI Film Products*, 114 S. Ct 1483, 1497 (1994), and which Congress could not nullify prospectively except for a "public use" and then only upon payment of "just compensation" pursuant to the Takings Clause. *Id.*

to enter into contracts establishing vested rights, the abrogation of which by later legislation gives rise to a claim for damages, and (2) whether the thrift regulators did so in the cases before the Court. The answers to those questions, which Dollar addresses in turn below, do not favor the government.

I. FEDERAL THRIFT REGULATORS HAD BROAD STATUTORY AUTHORITY TO ENTER INTO BINDING CONTRACTS REGARDING THE USE OF SUPERVISORY GOODWILL TO CALCULATE REGULATORY CAPITAL

Agencies of the federal government have broad discretionary authority in carrying out their functions, including the authority to contract when the agency determines that it is in its program interests to do so. *See American Fed. of Gov't Employees, Local 2017 v. Brown*, 680 F.2d 722 (11th Cir. 1992), *cert. denied*, 459 U.S. 1104 (1983); *Local 2855, AFGE (AFL-CIO) v. United States*, 602 F.2d 574 (3d Cir. 1979). And it has long been recognized that the federal government has the power to enter into contracts that confer vested rights on private parties. *See, e. g., Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986) ("*POSSE*") ("the Federal Government, as sovereign, has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights"); *Perry* v. *United States*, 294 U.S. 330, 350-59 (1935); *Lynch* v. *United States*, 292 U.S. 571, 579 (1934). Government contracts are customarily entered into between federal agencies and private parties, not only for the provision of goods and services to the government, but also (as in the

case of the thrift agreements here) to achieve regulatory goals of Congress.[6]

Federal agencies "normally have the discretion to decide whether to accomplish their objectives by contract or through the use of Government employees." 1 Ralph C. Nash, Jr. & John Cibinic, Jr., *Federal Procurement Law* 5 (3d ed. 1977). The federal thrift regulators were not treated different from other agencies in this regard. Since its inception, the FSLIC had the "power . . . [t]o make contracts." 12 U.S.C. § 1725(c)(3) (1988) (repealed). This authority to contract was at least coextensive with the express statutory delegations of authority that the FSLIC, and the FHLBB, as its operating head, 12 U.S.C. § 1725(a) (1988) (repealed), could use to carry out their oversight of the thrift industry. As particularly relevant here, the federal thrift regulators had the authority to extend "assistance" to acquirors of insolvent FSLIC-insured institutions, 12 U.S.C. § 1729(f)(2)(A) (1988) (repealed), and relatedly, the authority to set minimum capital levels on a case-by-case basis, 12 U.S.C. § 1730(t) (1988) (repealed). Taken together, the power to grant broad assistance in connection with acquisitions and the authority

---

[6]*See, e.g.*, 7 U.S.C. § 608(2) (Secretary of Agriculture empowered in carrying out, through contractual arrangements, Congressional policy of maintaining orderly marketing conditions of agricultural commodities); 16 U.S.C. § 590a (similar authority in carrying out policy of preventing soil erosion); 25 U.S.C. § 450f (Secretary of Interior authorized and directed to enter into "self-determination" contracts with Native American tribes pursuant to the Indian Self-Determination and Education Assistance Act); 18 U.S.C. § 3621(b) (allowing Bureau of Prison officials to contract with private persons for incarcerating federal prisoners).

to set capital levels on a case-by-case basis provided the federal thrift regulators with the necessary authority to enter into binding contracts addressing regulatory capital issues, including the use of supervisory goodwill in calculating regulatory capital.[7]

The United States argues that those statutes are inadequate to the task because they did not expressly authorize the FHLBB and the FSLIC to enter into agreements regarding supervisory goodwill. Pet. Br. at 41. The government has, however, not always been so insistent upon explicit statutory language authorizing an agency to contract with private persons, even with regard to matters touching upon so-called "core" government activities. In an opinion rejecting the Comptroller General's challenge to the practice of the Federal Bureau of Prisons to place federal prisoners in private prisons under various contracts with the owners of such facilities, the Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, declared that "the power of an agency to contract for services is not dependent on specific authority to enter into such contract." 16 U.S. Op. Off. Legal Counsel 75,

---

[7]As the Acting Comptroller General concluded:

> In making the agreements, FSLIC acted under broad statutory authority to set the terms and conditions of the assistance it would give to the acquirers of troubled thrifts. Any attempt by the government to cancel the agreements . . . could amount to a breach of contract and also could be challenged as an unconstitutional taking of property without just compensation.

August 27, 1990 Letter From Milton J. Socolar, Acting Comptroller General of the United States to Senator Terry Stanford, Committee on Banking, Housing and Urban Affairs, and enclosed Memorandum (GAO Doc. No. B-240860).

87 (1992). The Office of Legal Counsel explained that "[t]he authority of the executive to use contracts in carrying out authorized programs is. . . generally assumed in absence of express statutory prohibitions or limitations." *Id*. at 86, quoting 1 Nash & Cibinic, *supra*, at 5, 10.

As evidenced by the fact that they undertook to resolve, at least in part, the thrift industry crisis through contracts, the federal thrift regulators were certainly of the view that their organic statutes certainly did not prohibit and, in fact, invested them with sufficient authority to enter into binding agreements in which the use of supervisory goodwill for regulatory capital purposes was a bargained-for provision. The federal thrift regulators understood that "assistance in a merger or acquisition" was authorized by 12 U.S.C. § 1729(f) (1988) (repealed), "'within the sole discretion' of the FSLIC," and upon "'such terms and conditions' as it may prescribe." According to the FHLBB, the "maximum flexibility" afforded by the statute "must be retained in this area in order to enable the FSLIC to take all steps that may be necessary to prevent the failure of insured institutions that involve the least cost to the insurance fund." 52 Fed. Reg. 39065 (Oct. 20, 1987).

Relying upon that very statutory authority, the federal regulators aggressively implemented a contract-based program expressly sanctioning the use of supervisory goodwill in calculating regulatory capital in order to make acquisitions of failing thrifts economically feasible to the acquiring institutions. The various cases filed by acquiring thrifts seeking to enforce the pre-FIRREA regulatory capital promises made by the FHLBB and the FSLIC illustrate that such contractual understandings were not isolated or aberrational instances, but a major component of

a regulatory effort that employed such promises to promote assisted acquisitions of failed thrifts.[8]

The actions of the thrift regulators, charged with administering these statutory provisions, speak loudly as to the breadth of those provisions. *See, e.g., Chevron, U.S.A.. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). The contemporaneous actions and statements of the FSLIC and FHLBB are plainly far more persuasive as to whether these now-repealed statutes delegated to those agencies authority to enter binding contracts than the contrary litigation-based interpretation now offered by the government. *See Lawrence* v. *Chater*, No. 94-9323, slip op. at 11-12 (U.S. Jan. 8, 1996) (acknowledging "concern that postlitigation interpretations [of a statute by the Government] may be the product of unfair or manipulative Government litigating strategies, and we therefore view late changes of position by the Government with some skepticism"); *Bowen* v. *Georgetown University Hosp.*, 488 U.S. 204, 212 (1988) (deference to agency interpretation not applicable to agency litigation positions that are unsupported by regulations, rulings, or administrative practice).[9]

---

[8] In its certiorari petition (Pet. at 13), the United States reported that over 90 cases raising similar supervisory goodwill claims are currently pending in the Court of Federal Claims.

[9] The notion that the FSLIC and FHLBB lacked authority to enter into binding contractual commitments regarding the use of supervisory goodwill for regulatory capital purposes is also a litigation position of fairly recent vintage. In *Carteret Savings Bank, F.A.* v. *Office of Thrift Supervision*, 963 F.2d 567 (3d Cir. 1992), Dollar Bank, as amicus in that case, argued that the FHLBB and FSLIC had the authority to enter into binding contracts that would confer vested rights regarding supervisory goodwill. In its reply brief, the government acknowledged "That may be true. . .,"

Moreover, Congress was well aware that the federal thrift regulators had used their statutory authority to implement a regulatory regime to assist acquirors of failing thrifts by entering into various arrangements regarding the regulatory capital treatment of supervisory goodwill. Congress did not upset that regulatory approach and, in fact, expressly sanctioned its use.

In 1987, a year when the thrift industry was losing nearly $7 billion and the FSLIC insurance fund had a deficit of over $6 billion, Congress passed the Competitive Equality Banking Act of 1987 ("CEBA"), Pub. L. No. 100-86, 101 Stat. 552 (1987). Among other things, CEBA required the FSLIC to prescribe uniformly applicable GAAP accounting standards to be used by all insured institutions for regulatory purposes. CEBA § 307,12 U.S.C. § 1730h(b) (1988) (repealed). However, in explicit recognition of existing arrangements regarding supervisory goodwill, CEBA itself provided that the uniformity

---

and was content with pointing out that Dollar had failed to identify some statutory "provision establishing that Congress had delegated [the thrift regulators] the power to prohibit the legislature from altering the regulatory scheme to meet radically changed circumstances." Reply Brief for the Appellants at 21, *Carteret Savings Bank, F.A.* v. *Office of Thrift Supervision*, *supra*. As discussed earlier, however, since one Congress could not itself bind another Congress, the absence of some provision authorizing the FHLBB or FSLIC to do so is meaningless. The key question is whether those agencies had the authority to create binding contracts in which the agencies agreed that, if subsequent legislation prevented performance of their contractual promises, the government would be liable for any resulting damages. On that point, however, the government had no quarrel with Dollar's description of the thrift regulators' authority under the then-applicable statutes.

requirement "shall not affect the authority of the [FSLIC] to authorize insured institutions to utilize subordinated debt and goodwill in meeting reserve and other regulatory requirements." CEBA § 307, 12 U.S.C. § 1730h(d) (1988) (repealed). The Senate Report makes clear that "[n]othing in this section is intended to eliminate the flexibility of the Bank Board and of the FSLIC in determining the includibility of subordinated debt instruments as regulatory capital or to require the deduction of goodwill." S. Rep. No. 19, 100th Cong., 1st Sess., at 20, *reprinted in* 1987 U.S.C.C.A.N. 489, 510.

In short, what Congress said in 1987 about the scope of the federal thrift regulators' authority cannot be ignored, even though the government has conveniently failed to acknowledge its existence, let alone its significance. *See Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-81 (1969); *accord Lorillard, Inc.* v. *Pons*, 434 U.S. 575, 580-82 (1978). Not only was Congress aware of how the federal thrift regulators had been using supervisory goodwill for accounting and regulatory accounting purposes, but in CEBA Congress expressly validated the authority of federal thrift regulators to enter into such arrangements and encouraged the continued use of supervisory goodwill as a means to deal with failing thrifts without depleting the FSLIC's deposit insurance fund.

II. THE CONTRACTS "UNMISTAKABLY" GIVE RESPONDENTS VESTED RIGHTS, THE ABROGATION OF WHICH ENTITLES THEM TO RECOVER DAMAGES

Perhaps recognizing that its lack of statutory authority argument is less than fully convincing in light of the plain language of the then-governing statutes, undeniable administrative practice and Congress' endorsement of the practice, the United States relegates that otherwise

threshold argument to second place in its brief. Instead, the government leads with the argument that the FHLBB and FSLIC made no binding commitments to respondents that created vested rights in the use of supervisory goodwill for regulatory capital purposes. As the government sees it, in order for those agencies to have made contractual commitments regarding respondents' use of supervisory goodwill, those commitments had to "be expressed clearly and unmistakably in the language of the contractual documents." Pet. Br. at 11. Relying upon the so-called "unmistakability doctrine," articulated by this Court in *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986), the United States asserts that it did not make any contractual "commitments . . . to continue to permit goodwill to be counted as capital." Pet. Br. at 12. According to the United States, what respondents consider to be contracts were merely "directives as to what respondents must do to comply with current regulatory policy." *Id.*

Dollar submits that the courts below correctly concluded that the unmistakability doctrine has no application where, as here, the remedy sought is damages for breach of contract. But even accepting the government's premise that the unmistakability doctrine applies here, it does not follow that respondents are not entitled to relief. As is demonstrated by the Statesman contract (which, of the three contracts at issue, most closely resembles Dollar's contract), thrift acquirors received contractual commitments in unmistakable terms guaranteeing for a specific period of time the use of supervisory goodwill in calculating regulatory capital. That such promises may not be enforceable through specific performance because the thrift agencies could not bind Congress, does not mean that respondents are not entitled to damages for the government's breach of its commitment.

Although the United States would have the Court believe otherwise, it is not an uncommon practice for government contracts to contain "provisions shifting financial responsibility to the government for events which might occur in the future." *Hughes Communications Galaxy, Inc.* v. *United States*, 998 F.2d 953, 959 (Fed. Cir. 1993). The government may assume the risk of economic loss from supervening events through either express or implicit arrangement. *Id.; D & L Construction Co. & Assocs.* v. *United States*, 402 F.2d 990, 999 (Ct. Cl. 1968). "It has long been established that while the United States cannot be held liable directly or indirectly for public acts which it performs as a sovereign, the Government can agree in a contract that if it does exercise a sovereign power, it will pay the other contracting party the amount by which its costs are increased by the Government's sovereign act." *D & L Construction*, 402 F.2d at 999; *see, e.g., Gerhardt F. Meyne Co.* v. *United States*, 76 F. Supp. 811, 815 (Ct. Cl. 1948) (a government agency "cannot enter into a binding agreement that it will not exercise a sovereign power, but it can say, if it does, it will pay you the amount by which your costs are increased thereby"); *Security Fed. Sav. & Loan Ass'n of Albuquerque* v. *FSLIC*, 796 F. Supp. 1435, 1447 (D.N.M. 1991) (although the government "'cannot enter into a binding agreement that it will not exercise a sovereign power, . . . it can say, if it does, it will pay . . . the amount by which . . . costs are increased thereby'"), *aff'd sub. nom Resolution Trust Corp.* v. *FSLIC*, 25 F.3d 1493 (10th Cir. 1994); *accord Wah Chang Corp.* v. *United States*, 282 F.2d 728, 735 (Ct. Cl. 1960), quoting *Gerhart F. Meyne Co.*, 76 F.Supp. at 815. In other words, the United States can by contract agree to pay damages for the exercise of its sovereign power.[10]

---

[10]In these circumstances, the so-called sovereign acts

The United States argues, however, that no respondent has a contract that "unmistakably grant[s] . . . the right . . . to continue to count goodwill as capital for purposes of meeting federal capital requirements." Pet. Br. at 22. In other words, the government would have the Court conclude that it is not clear from the contracts at issue that the thrift regulators agreed that respondents would be compensated if subsequent legislation prevented the government from fulfilling its promises regarding supervisory goodwill. The United States is wrong.

The government begins by pointing out that the 1988 Assistance Agreement between the FSLIC and the Statesman plaintiffs does not explicitly mention supervisory goodwill. Pet. Br. at 32. But as the United States must concede, the Statesman Assistance Agreement contains a clause expressly incorporating as part of the contract the contemporaneously issued FHLBB Resolution. *Id.* That Resolution, in turn, provides that Statesman may amortize supervisory goodwill up to twenty-five years, and may treat the amortized amount as an asset for all regulatory purposes, notwithstanding later changes in FHLBB regulations. In short, the cross reference in the Assistance Agreement to the FHLBB Resolution establishes that the

---

doctrine -- which shields the United States from liability for contract damages if legislation of general and public applicability renders its performance impossible, *see Horowitz* v. *United States*, 267 U.S. 458, 461 (1925) -- is beside the point as the government has, as a contracting party, agreed to be liable for damages if it cannot perform its contractual promises due to intervening legislation. *See Security Fed. Savings and Loan Ass'n of Albuquerque*, 796 F. Supp. at 1447; *see also D&L Construction*, 402 F.2d at 999.

two documents are an integrated whole and are not to be read in isolation as the government maintains.[11]

The thrift parties were fully cognizant of possible changes in the regulatory regime, and bargained for and

---

[11]The United States also contends that even if the FHLBB Resolution is part of the contract, the Statesman plaintiffs had no vested right to continue to count supervisory goodwill as part of regulatory capital because of the clause in the Assistance Agreement precluding "unlawful action or inaction of the parties." Pet. Br. at 35. The United States offers no evidence that the parties understood this general boilerplate clause as overriding the specific provision in the integrated contract regarding supervisory goodwill, and such a reading is strongly disfavored by traditional rules of contract interpretation. *See, e.g., Hills Materials Co.* v. *Rice*, 982 F.2d 514, 517 (Fed. Cir. 1992) ("Where specific and general terms in a contract are in conflict, those which relate to a particular matter control over the more general language"). In this regard, the Accounting Principles Section of the Statesman Assistance Agreement specifically provides that the accounting treatment to be accorded supervisory goodwill as set forth in the agreement controls if in conflict with subsequent regulatory changes. *See infra* page 22. Since the specific language controls over the general, *see Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992), the language of the Accounting Principles Section trumps the more general language cited by the government. *See Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222, 228 (1957) ("[T]he law is settled that '[h]owever inclusive may be the general language of a statute, it "will not be held to apply to a matter specifically dealt with in another part of the same enactment"'.")

But even if the clause is interpreted to apply to the contract as a whole, it would at most only preclude the remedy of specific performance. While FIRREA may make it unlawful specifically to enforce the supervisory goodwill promises made, the statute certainly does not make it unlawful for the government to pay damages.

obtained contract language guaranteeing their ability to use supervisory goodwill for regulatory capital purposes for a specified period even if doing so would be in conflict with later accounting regulatory standards. The "Accounting Principles" clause of the Statesman Acquisition Agreement begins by stating that "any computations made for the purposes of this Agreement shall be governed by GAAP," which recognized goodwill as an asset, "except where such principles conflict with the terms of the Agreement, applicable regulations in the [FHLBB] or the [FSLIC], or any resolution or action in the [FHLBB] approving or relating to the Acquisition, the Mergers or to this Agreement, then this Agreement, such regulations, or such resolution or action shall govern." J.A. 402. Having thus assured the primacy of the Agreement over any conflicting GAAP principles, the parties went on to make the accounting provided for in the Resolution -- authorizing Statesman to amortize the supervisory goodwill produced by the acquisitions over twenty-five years (J.A. 458-59) -- paramount over any conflicting regulations, whether then in effect or later adopted.

> If there is a conflict between such regulation and the [FHLBB's] resolution or action relating to the Acquisition, the Mergers or this Agreement, *the [FHLBB's] resolution or action shall control*. For purposes of this section, the accounting principles and governing regulations shall be those in effect on the Effective Date, as subsequently changed, amended, clarified by the [FHLBB] . . .[12]

---

[12]Curiously, the United States draws the contrary conclusion (Pet. Br. at 31) by focusing on the second sentence of the quote to the total exclusion of the first sentence which makes it clear that the Resolution controls over conflicting regulations.

J.A. 403 (emphasis added) In short, as bargained for by Statesman, the accounting treatment for supervisory goodwill authorized by the Resolution controls over both conflicting GAAP accounting principles and FHLBB regulations either in effect at the time the Agreement was executed or as changed subsequently.

In some cases the government has argued that the acquiring thrift assumed the risk of a change in regulatory standards, citing explicit contractual provisions that it claims make clear that the supervisory goodwill arrangements in those agreements were subject to changed regulatory standards. *E.g., Guaranty Financial Services, Inc.* v. *Ryan*, 928 F.2d 994, 999 (11th Cir. 1991) (contract stated that "subsequent amendments to such regulations may be made and that such amendments may increase or decrease the Acquiror's obligation under this Agreement"). Even assuming that the government's reading of the scope of the reservation is correct, the contract language in *Guaranty* is in stark contrast to the language in the Accounting Principles section of the Statesman contract in which the provisions of the agreement *are expressly made to control over subsequent regulatory changes*.

If, as the United States argues, the language in the Statesman contract does not meet the "unmistakability test," then no language could ever suffice. In other words, the government effectively is proposing a rule of law that it can never be found liable for damages (or even for restitution or just compensation) notwithstanding contractual language that places the risk of subsequent legislation squarely on the government. There is simply no support for the notion that

all economic loss should be borne by respondents in these circumstances.[13]

The United States' position that respondents somehow accepted that risk simply denies the economic realities. According to the government, Pet. Br. at 27, "transactions of this sort offered a number of immediate benefits to the acquiring thrifts that would justify taking just such a risk." *See also* Pet. Br. at n.20. It would, however, have made no sense for Dollar or any of the respondents to accept without recourse the risk of the government's non-performance of its contractual obligations, and thereby allow the government to leave with them the losses that

---

[13]The United States now suggests that supervisory goodwill was one of the "capital gimmicks that 'masked the inadequate capitalization of thrifts'," or that it is a "shadowy concept," "valueless" and "no good," and that it "means. . . that the taxpayer ultimately picks up the tab for the shortfall" when the government liquidates a failed thrift. Pet. Br. at 4-5. But as the above quotation from former FHLBB Chairman Richard Pratt illustrates, *see supra* page 5, the federal thrift regulators regarded supervisory goodwill as an "indispensable tool" that minimized the exposure of the FSLIC insurance fund and shifted those losses to the acquiring institution.

Moreover, contrary to what it now maintains, the government profited substantially through its aggressive use of that "gimmick." Although some acquiring thrifts were unable to survive once the government disallowed the promised use of supervisory goodwill in calculating regulatory capital, others -- like Dollar -- were able to meet FIRREA's new regulatory capital standards even without counting supervisory goodwill. As a consequence, the FSLIC insurance fund was never tapped for the costs of paying off the depositors and liquidating the thrifts acquired by institutions like Dollar. In fact, in Dollar's case alone, the government saved about $155,000,000, the difference between Contential's estimated net liabilities ($230,000,000) and the cash ($75,000,000) that the FHLBB agree to provide Dollar under the Assistance Agreement.

would otherwise be posted to the FSLIC deposit insurance fund. While the acquiring thrifts undeniably viewed the transaction as providing potential benefits, the government's theory would permit the thrift regulators to change the supervisory goodwill rules the day after the transaction was completed and well before the thrifts could realize any benefit from the acquisition.

It is simply not reasonable to believe that the respondents or other acquiring thrifts like Dollar would accept the burden of the losses of the insolvent thrifts, and leave the government with a right to nullify any potential benefit from the acquisition without also securing a right to seek damages if Congress enacted legislation preventing the thrift regulators from honoring their promises. *See Appleby v. Delaney*, 271 U.S. 403, 413 (1926). It must be remembered that it was the federal thrift regulators who were anxious to conclude the transactions. Consequently, acquiring thrifts like Dollar and the respondents were able to negotiate binding commitments that left the risk of a later change in regulatory approach with the government.

When all is said and done, the government's plea in these cases is for the Court to permit it to retain the substantial benefits it received from the respondents and other acquiring thrifts, like Dollar, without requiring that it perform the promises it made or to pay the losses sustained as a result of its failure to perform. There is no justice in that solution. "[O]rdinary principles of equity and justice preclude the United States from retaining . . . benefits and at the same time refusing to pay for them on the ground that the contracting officer's promise was unauthorized or unenforceable for some. . . reason." *Prestex Inc.* v. *United States*, 320 F.2d 367, 373 (Ct. Cl. 1963).

CONCLUSION

The judgment of the Federal Circuit should be affirmed.

March 1996

Respectfully submitted,

*PAUL BLANKENSTEIN
JOHN K. BUSH
GIBSON, DUNN & CRUTCHER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Amicus Curiae Dollar Bank, F.S.B.

**Counsel of Record*

Of Counsel:

ROBERT T. MESSNER
General Counsel
Dollar Bank, F.S.B.
Three Gateway Center
9 North
Pittsburgh, PA 15222
(412) 261-7524

MOTION FILED
APR 24 1996

(17)

No. 95-865

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Petitioner,

v.

WINSTAR CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF OF RESPONDENT GLENDALE FEDERAL BANK, FSB

CARTER G. PHILLIPS
RICHARD D. BERNSTEIN
SIDLEY & AUSTIN
1722 I Street, N.W.
Washington, D.C. 20006
(202) 736-8000

JOE G. HOLLINGSWORTH
JERRY STOUCK *
SPRIGGS & HOLLINGSWORTH
1350 I Street, N.W.
Washington, D.C. 20005
(202) 898-5800
Attorneys for Respondent Glendale Federal Bank, FSB
* Counsel of Record

Date: April 25, 1996

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-865

UNITED STATES OF AMERICA,
Petitioner,

v.

WINSTAR CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Pursuant to Sup. Ct. R. 25.6, respondent Glendale Federal Bank, FSB ("Glendale") respectfully requests leave to file a three page supplemental brief to correct serious misstatements of the procedural record contained in petitioner's reply brief.* Although Glendale is hesitant to present the Court with additional briefing, Glendale could not have used its respondent's brief to anticipate the pe-

---

* Glendale postponed filing this motion until after oral argument in the event the issue could be adequately addressed there. Because the Court's questioning focused on other issues, Glendale seeks leave to file a short supplemental brief. Because of this Court's upcoming conference, this motion and supplemental brief were filed initially in typewritten form, pursuant to Rule 33.2. They are being refiled in printed booklet form (as required by Rule 33.1) as soon as possible. Glendale's Rule 29.6 statement is included in Brief for Respondent Glendale Federal Bank, FSB ("Glendale Br.") at ii.

titioner's misstatements of the procedural record in its reply brief.

Specifically, petitioner's reply brief asserts that, contrary to Court of Federal Claims Rule 56(d)(3), this Court should ignore the uncontroverted facts and affidavits submitted in the Court of Federal Claims because discovery "was stayed" in that court. Reply Br. at 7 n.6. Petitioner fails to inform the Court that *after* Glendale moved for summary judgment in September 1991, *petitioner* sought in October 1991 and received, over Glendale's objection, a stay of discovery that continued through petitioner's filing of its opposition to Glendale's motion for summary judgment in June 1992. *See* Defendant's Cross-Motion To Stay Proceedings On Glendale's Motion For Summary Judgment As To Liability (filed Oct. 11, 1991). This Court has held that a party may not acquiesce in, much less obtain, a delay in discovery and later request a delay in the trial court's entering summary judgment so that the same party may conduct discovery. *See First Nat'l Bank* v. *Cities Servs. Co.*, 391 U.S. 253, 291-94 (1968) (interpreting Fed. R. Civ. P. 56(f), which is identical to R.C.F.C. 56(g)).

Petitioner's reply brief also neglects to inform this Court that not only did the Court of Federal Claims deny petitioner's request for a delay in ruling on Glendale's motion for summary judgment, *see* Pet. App. 152a, petitioner did not challenge that denial on appeal, nor did it object when Glendale relied on the uncontroverted facts and affidavits in the Federal Circuit. *See* Pet. App. 16a (noting that both parties have relied "on the uncontested facts of record"); Replacement Brief of Glendale, at 4-9 & n.2, 15-16 & n.5 (filed Nov. 26, 1993) (describing such facts and quoting Rule 56(d)(3)). Indeed, petitioner's opening brief correctly observed but did not challenge that "[t]he court of appeals also relied on what it termed 'other evidence and . . . the circumstances surrounding the transaction.'" Pet. Br. at 26 (quoting Pet. App. 22a). Thus, petitioner's extremely belated objection in its reply brief to this Court to Glendale's reliance on Rule 56(d)(3) and the uncontroverted facts, negotiating history, and affidavits in the trial court record could not have been anticipated by Glendale. Petitioner's last-second attempt to rewrite the record is untimely and has been waived. *See, e.g., Sisson* v. *Ruby*, 497 U.S. 358, 359-60 n.1 (1990) (issue waived if not raised in court of appeals); *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645-46 (1992) (issue waived where not raised in petition for certiorari).

For the foregoing reasons, Glendale's motion for leave to file a supplemental brief should be granted.

Respectfully submitted,

CARTER G. PHILLIPS
RICHARD D. BERNSTEIN
SIDLEY & AUSTIN
1722 I Street, N.W.
Washington, D.C. 20006
(202) 736-8000

JOE G. HOLLINGSWORTH
JERRY STOUCK *
SPRIGGS & HOLLINGSWORTH
1350 I Street, N.W.
Washington, D.C. 20005
(202) 898-5800

Attorneys for Respondent Glendale Federal Bank, FSB

* Counsel of Record

Date: April 25, 1996

SUPPLEMENTAL BRIEF OF GLENDALE FEDERAL BANK, FSB

Glendale's brief demonstrated that the two courts below properly found FSLIC's clear contractual commitment to recognize Glendale's goodwill had been established in two independently sufficient ways: (1) the contractual language; and (2) the uncontroverted facts, *see* Court of Federal Claims Rule 56(d)(3). *See* Glendale Br. at 21-24, 32-34. This Supplemental Brief addresses the petitioner's improper request that this Court ignore the second basis. The petitioner's reply brief belatedly argues that this Court should ignore Rule 56(d)(3)—and the uncontroverted facts, affidavits, and negotiating history appearing in the record before the Court of Federal Claims—because the trial court's stay of discovery allegedly prevented the government from effectively opposing summary judgment. Reply Br. at 7 n.6. This argument contravenes fundamental rules of civil, appellate, and Supreme Court procedure.

The Court of Federal Claims properly denied petitioner's request for a delay in ruling on summary judgment, *see* Pet. App. 152a, and both it and the Federal Circuit properly relied on what these courts described as facts that were "uncontroverted" and "not disputed," including the history of "extensive negotiations" on goodwill. Pet. App. 22a, 36a, 118a-119a, 124a, 142a-143a. Such uncontroverted evidence both confirms the lower courts' interpretation of the contractual language and demonstrates that, if there were any possible linguistic ambiguity in the contractual language viewed in isolation, the government's proffered interpretation was not fair and reasonable. *See* Glendale Br. at 32 & n.24 (citing four government contract and unmistakability decisions of this Court similarly using additional evidence).

An appellate court can review denial of a request for delay under Court of Federal Claims Rule 56(g)—or its identical twin, Fed. R. Civ. P. 56(f)—only for an abuse

of discretion. *Strang* v. *United States Arms Control & Disarmament Agency*, 864 F.2d 859, 861 (D.C. Cir. 1989) (R.B. Ginsburg, J.); 6 *Moore's Federal Practice* (pt. 2) ¶ 56.24, at 56-804 (2d ed. 1996) (citing cases). The government's request for delay in its attorney's affidavit was properly rejected for at least three reasons.

First, the government offered no reason why it could not oppose summary judgment by obtaining affidavits from *FSLIC* officials, if they could disagree under oath with Glendale's affiants' description of the intended scope of the government's obligation under the contract. *See, e.g., Emmons* v. *McLaughlin*, 874 F.2d 351, 357 (6th Cir. 1989) (affidavit under Fed. R. Civ. P. 56(f) improper when non-movant can use own knowledge to oppose summary judgment); *Woods* v. *FHLBB*, 826 F.2d 1400, 1414 (5th Cir. 1987) (same), *cert. denied*, 485 U.S. 959 (1988).[1]

Second, because it was petitioner that obtained the stay of discovery after Glendale moved for summary judgment, petitioner cannot use its own prior delay in seeking discovery as a basis for further delay under Court of Federal Claims Rule 56(g). *See* Mot. at 1-2 (citing *First Nat'l Bank* v. *Cities Servs. Co.*, 391 U.S. 253, 291-94 (1968)); *see also* Reply Br. at 2a (government attorney's affidavit: "*defendant's* view has been that discovery is unnecessary and inappropriate in this action") (emphasis added).

Third, the requirements placed on a non-movant by Court of Federal Claims Rule 56(d) are conjunctive: material facts claimed as uncontroverted by the movant must be "included in the Statement of Genuine Issues *and* . . . controverted by affidavit or other written or oral evidence." (Emphasis added.) Nothing in Rule 56(g), or in the government attorney's affidavit in the Court of

[1] Even as to Glendale's intent, the petitioner's affidavit failed to provide the required "reason to question the veracity of [movant's] affiants." *Strang*, 864 F.2d at 861.

Federal Claims, excuses the petitioner's failure to file *any* Statement of Genuine Issues at all.

In any event, the petitioner did not challenge—either in the Federal Circuit, in its petition for certiorari, or in its opening merits brief—the denial by the Court of Federal Claims of its request for delay of that court's summary judgment ruling. Thus, petitioner's belated request in its reply brief that this Court ignore Rule 56(d)(3) and the uncontroverted facts in the trial court record has been waived. *See* Mot. at 2.

Respectfully submitted,

CARTER G. PHILLIPS
RICHARD D. BERNSTEIN
SIDLEY & AUSTIN
1722 I Street, N.W.
Washington, D.C. 20006
(202) 736-8000

JOE G. HOLLINGSWORTH
JERRY STOUCK *
SPRIGGS & HOLLINGSWORTH
1350 I Street, N.W.
Washington, D.C. 20005
(202) 898-5800

Attorneys for Respondent Glendale Federal Bank, FSB

* Counsel of Record

Date: April 25, 1996